90-887

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

GAETANA R. KETCHEL, *et al.*,
Petitioners,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state court deny United States citizens their Fifth and Fourteenth Amendment rights when it holds unqualifiedly that in order to invalidate a zoning regulation on constitutional grounds, the citizens must demonstrate, beyond fair debate, that the zoning classification denies them all economically viable use of their land without substantially advancing a legitimate interest in the health, safety or welfare of the community, or does proof of either economic infeasibility or lack of a logical nexus between ends and means require invalidation?

2. Does the Fifth Amendment Just Compensation Clause require that *all* economically viable use of land be denied by a zoning restriction before a taking occurs and compensation is payable?

3. Does a zoning restriction which, in effect, necessitates a change of ownership of the land in order for it to be utilized for the purpose permitted by zoning constitute a taking of the landowner's right to use his or her land for some reasonable purpose?

4. Does a zoning restriction which effectively limits the use of land to churches, schools, public recreation, governmental buildings or cemeteries constitute a Fifth and/or Fourteenth Amendment taking of such lands?

5. Can a zoning restriction which is more restrictive than is necessary to carry out the public purpose underlying its enactment be sustained as substantially advancing a legitimate public purpose?

6. Must a court specifically determine that a land use regulation either does or does not substantially advance the legitimate state interest it was enacted to effectuate before the court can determine whether or not the land use regulation affects a Fifth and Fourteenth Amendment Due Process of Law taking?

7. When a zoning restriction is challenged by a property owner on the basis that the regulation does not substantially advance the legitimate state interest that it was enacted to effectuate and the landowner introduces substantial probative evidence to that effect, does the burden of proof shift to require the zoning authority to introduce evidence which proves within fair debate, if not by a preponderance, that the regulation substantially advances the legitimate state interest before the court can find that the resolution is constitutionally valid?

OTHER PARTIES NOT LISTED IN THE CAPTION AND STATEMENT OF CORPORATE RELATIONSHIPS

Petitioners:

EUGENE C. MUGGLETON
JEAN M. MUGGLETON
TITLE GUARANTEE & TRUST CO.
TRAFFIC AND REVENUE CONTROLS CO.
EDWARD A. PUZDER
RUTH ANNE PUZDER
LOUIS H. RICE, Trustee for the Benefit of
LORRAINE FRANKINO

Respondents:

ELEANOR MATTSON, Township Trustee
ROBERT SCHLATZER, Township Trustee
WILLIAM REPKE, Township Trustee
FRED L. KRUEGER, Township Zoning Inspector

In addition, the State of Ohio, County of Geauga, Township of Bainbridge, and the Kenston Local and Chagrin Falls Exempted Village School Districts, *ex rel.* GAETANA R. KETCHEL, *et al.*, were named as Plaintiffs in a cause of action that sounded as a taxpayer's action. That cause of action and those entities were dismissed at trial.

Title Guarantee & Trust Co. has no beneficial interest in the subject property. As a subsidiary of the Lawyer's Title Insurance Company, it merely holds title for two pension plan trusts of which Edwin J. Ketchel is the beneficiary. Traffic and Revenue Controls Co. is not a parent or subsidiary of any other corporation.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Cases

United States Constitution

Township Resolutions

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Gaetana R. Ketchel, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio in the above entitled case.

REPORTS OF DECISIONS DELIVERED BELOW

The opinion of the Supreme Court of Ohio has been reported in advance sheets, as follows: *Ketchel v. Bainbridge Township*, 52 Ohio St. 3d 239 (1990). It also is reprinted in the Appendix hereto at pages A1-17. The judgment entries and opinions of the Eleventh District (Ohio) Court of Appeals, on reconsideration and on original decision, are not reported. They are reprinted in the Appendix hereto at pages A20-37 and pages A38-56, respectively. The judgment entry and opinion (findings of fact and conclusions of law) of the Geauga County Court of Common Pleas are not reported. They are reprinted in the Appendix hereto at pages A57-61. The Order of the Supreme Court of Ohio Denying Rehearing is reprinted in the Appendix hereto at page A62.

JURISDICTION

The Petitioners own 256 acres of land in Bainbridge Township, Ohio. The Petitioners took title[1] when zoning permitted residential development on one acre lots. The Zoning Resolution at issue was later amended effective December 5, 1979 to limit development of Petitioners' lands to three acre minimum lots, and to limit use to: (a) Agriculture; (b) Single Family Dwellings; (c) Places of Worship; (d) Public and Private Schools; (e) Public Parks, Playgrounds and Other Public Recreational Facilities; (f) Township and other Governmental Buildings; and (g) Cemeteries.

Administrative relief to reduce minimum lot sizes or to permit other uses by way of a variance was not available to Petitioners. Section 15J-40 of the relevant Zoning Resolution provides, "the Board of Appeals shall not grant any application for a variance if the result

[1] One Petitioner, Louis Rice, Trustee, took legal title in 1981. However, his settlor, Lorraine Frankino, took her title in 1976.

sought by the application could be substantially accomplished by a rezoning of the property." As indicated at page 15, *infra*, Petitioners applied to rezone their property. The application was denied, whereupon Petitioners filed a complaint for declaratory judgment contending, as pertinent here, that Respondents' zoning violated their rights under the United States Constitution to not have their property taken without just compensation and due process of law. In apparent recognition of the practical unavailability of a variance, Respondents waived at trial their right to litigate failure to exhaust administrative remedies as an affirmative defense to the declaratory judgment complaint.

The trial court and the Supreme Court of Ohio each found that three acre residential development of Petitioners' lands was economically infeasible. The Supreme Court of Ohio also conceded that agricultural use is infeasible. However, for different reasons, neither court found Petitioners' economic loss sufficiently compelling to require invalidation on constitutional grounds.[2] The trial court held, apparently, that economic infeasibility does not compel a finding of unconstitutionality when a legitimate purpose for the zoning can be perceived. The Supreme Court of Ohio held that economic infeasibility was not proved because, in its view, Petitioners failed to prove infeasibility of the alternate secondary uses.

Thus, this case initially asks the Supreme Court of the United States to consider whether government takes private property for public use when it effectively limits development of a 256 acre parcel to churches, cemeteries, schools and government buildings and parks. While the case is more complex than this distillation of Petitioners' complaint, Petitioners submit that if government goes too far when it restricts large tract development to religious and public uses, then the subject case begs to be granted a writ of certiorari.

[2] The Court of Appeals held that the economic infeasibility for residential development was not proved, for reasons elsewhere described in this brief, at pages 4-5.

The opinion of the Supreme Court of Ohio was rendered on July 18, 1990. A timely petition for reconsideration was filed and denied without opinion on September 5, 1990. This petition for certiorari has been timely filed within 90 days of entry of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 6D and 15J of the Zoning Resolution of Bainbridge Township, effective December 5, 1979, is attached at pages A63-A69 of the appendix.

RAISING THE FEDERAL QUESTION

Petitioners alleged violations of their rights under the United States Constitution in four of five causes of action in the complaint. These included confiscation without due process of law and taking without compensation in violation of the United States and Ohio Constitutions. The essential constitutional questions thus were raised at the earliest possible time and were reiterated at each appellate level.

STATEMENT OF THE CASE

This case measures the degree of economic infeasibility which constitutes confiscation, and the degree of relationship between ends and means which meets the Supreme Court's "substantial relationship" test for land use regulation.

This zoning case involves 256 acres in Bainbridge Township, Geauga County, Ohio, 250 acres of which are undeveloped. Bainbridge Township abuts the eastern edge of Cuyahoga County, and is changing from farm use to a suburban community within a 40 minute commute of Cleveland, Ohio. The relevant zoning requires development on three acre minimum lot sizes. The Petitioners challenge the three acre designation as applied to their lands because it confiscates the economic value of their property and does not substantially advance a legitimate government purpose.

The subject appeals commenced after the trial court specifically found that Petitioners could not residentially develop their property on an economically viable basis in conformity with applicable local zoning and Geauga County Planning Commission regulations. Notwithstanding this finding, the trial court concluded that Petitioners had failed to demonstrate beyond fair debate that the subject zoning was unconstitutional because the court presumed a valid public purpose for the zoning.

The trial court did not articulate what that valid public purpose might be. Thus, it could not and did not state how the zoning might serve that purpose.

On appeal to the three judge Geauga County Court of Appeals, one judge argued in dissent that the finding of economic infeasibility rendered the zoning unconstitutional. However, the two judge majority on the Court of Appeals upheld the zoning because, they said, economic infeasibility can exist only when physical

characteristics of the land or the influence of surrounding uses renders the property useless and Petitioners' infeasibility could be attributed to general economic conditions. Finally, the court said, there was a valid public purpose to support large lot zoning. It articulated that purpose to be protection of underground water supplies.

The court found water protection to be a valid reason for the three acre zoning even though all available studies had concluded that adequate water exists for residential development on lots of one acre or less.

On discretionary review by the Ohio Supreme Court, a 4-3 majority of that court also concluded that Respondents' zoning was valid, notwithstanding the trial court's finding of economic infeasibility. Much of the opinion rendered by the Supreme Court of Ohio dealt with Petitioners' claims that elements of Respondents' zoning were unauthorized and illegal under the Ohio Township Zoning Enabling Act. On Petitioners' constitutional claims, the Ohio Supreme Court stated that Petitioners needed to demonstrate, "beyond fair debate, that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate [state] interest." *Ketchel v. Bainbridge Township* (A9, 10). The Ohio Supreme Court found room for fair debate over two relevant issues, to wit: water availability and economic infeasibility. On water, the court deferred to the "township's concern for preserving the underlying aquifer." (A11, 12). On economics, the court found that Petitioners "presented no evidence of economic infeasibility if the land were used for churches, schools, cemeteries, or public facilities." (A13, 14).

The Ohio Supreme Court's deference to local decisions on water usage was based upon evidence from a lay witness, who also was a defending Township Trustee. He tesified that nearby wells were producing at

25 percent of the capacity predicted on the well driller's original well logs. In seizing this testimony to signal fair debate over water, the Ohio Supreme Court ignored testimony from the same witness that even at this lower output, the wells in question serviced homes developed on one-third acre lots, without any interruption in service. In other words, actual well output did not contraindicate adequate water for one acre lots. Petitioners' evidence of adequate water for one acre lots was produced from studies by the Ohio Department of Natural Resources, the Northeastern Ohio Areawide Coordinating Agency (a quasi-public funding agency), the Geauga County Planning Commission, and from an admission by the Respondents' own, and only, expert witness, who acknowledged adequate water for one acre development. Based upon this evidence, the Ohio courts wrongly applied the constitutional test for determining the factual nexus between public ends and means.

Three acre lot sizes simply do not "substantially advance" the avowed protection of water supplies.

The Ohio Supreme Court's second relevant basis for rejecting Petitioners' appeal concerned economic infeasibility due to lot size. Here the court effectively held that zoning legally may limit development of a 256 acre tract to churches, schools, cemeteries and public buildings, where the primary zoning purpose of residential development could not be accomplished on an economically viable basis.

Petitioners submit that government can not limit development rights to a series of secondary uses that are facially confiscatory and arbitrary. However, if such power exists, it was abused by Respondents because the evidence at trial demonstrated no willing market for any such secondary use.

Jurisdiction in the Supreme Court of the United States is sought, then, because Petitioners believe the relevant case law requires a declaration that zoning is

unconstitutional on proof that it "denies an owner economically viable use of his land," even if the zoning serves a legitimate public purpose. *Agins v. Tiburon*, 447 U.S. 255, at 260 (1980). Jurisdiction is necessary because Ohio's courts continue to apply a two-pronged, conjunctive test to determine the validity of zoning (economic infeasibility without substantially advancing a legitimate public purpose), and because Ohio's two-pronged test as applied to the subject case has taken the only reasonable economically viable use available for Petitioners' residentially zoned land.

In short, the State of Ohio's restriction of Petitioners' development rights to churches, schools, cemeteries and public buildings without compensation, constitutes a taking of private land in violation of the Fifth Amendment to the United States Constitution.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Introduction

As indicated above, the Ohio Supreme Court, in the case at bar, states in its opinion that:

> In order to invalidate a zoning regulation on constitutional grounds, the parties attacking it must demonstrate, beyond fair debate, that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community. (A9, 10).

The Court then strings cites seven cases, including: *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), *Goldblatt v. Hempstead,* 369 U.S. 590 (1962), and *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), to support its proposition.

The recent decisions of the Supreme Court of the United States do not support the Ohio Supreme Court's two part conjunctive test quoted above.

For instance, this Court has in its unanimous decision in *Agins v. Tiburon,* 447 U.S. 255, at 260 (1980) adopted a two part disjunctive test:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138, n.36 (1978).

Further, the Ohio Supreme Court's use of the Beyond Fair Debate standard conflicts with this Court's pronouncement that, at least in Taking Clause cases, a reasonable nexus must exist between ends and means for regulation to " 'substantially advance' the 'legitimate

state interest' sought to be achieved." *Nollan v. California Coastal Commission*, 483 U.S. 825, 834, n.3 (1987) (citation omitted).

The evidence in the subject case demonstrated ample water to service one acre lot-size developments, and demonstrated, as stated in the dissenting opinion of Justice Brown on the issue of economic infeasibility, the government's substitution of "fantasy for reality." (A16).

Undoubtedly, historical roots of jurisprudence impede the Ohio Supreme Court's analysis of Taking Clause cases. For instance, the Supreme Court of Ohio comes to the zoning battle believing that compensation is not available to remedy excessive land use regulation. *See, Superior Uptown v. City of Cleveland*, 39 Ohio St. 2d 36 (1974), where all seven justices concurred in the syllabus, which reads: "A cause of action for money damages can not be maintained against a municipality for losses sustained as the result of the adoption of a rezoning ordinance which is subsequently declared invalid." This holding, of course, is contrary to this Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Petitioners fully briefed below the disjunctive, two-pronged test announced in *Agins v. Tiburon, supra*, and argued the importance of a proper application of that test in view of the holding in *First English Evangelical Lutheran Church of Glendale, supra*. Yet the Ohio Supreme Court reiterated its position that Petitioners "must demonstrate, beyond fair debate, that the zoning classification denies them the economically viable use of their land *without substantially advancing* a legitimate [government] interest . . . ." (A9, 10) (Emphasis added).

Without direction from this Court, Ohio property owners will remain unprotected of their rights under the United States Constitution, when resort is had to the courts of Ohio.

B. The Due Process Clause of the Fourteenth Amendment Prohibits the Enactment of a Zoning Restriction Which is More Restrictive than is Reasonably Necessary to Accomplish the Public Purpose Underlying its Enactment.

In analyzing Takings Clause cases, this Court and others have wrestled with the proper standard of judicial review. Such measures as "minimal scrutiny," "goes too far," and "beyond fair debate" have competed with "substantial relationship" and "an appropriate means to the public end."

Thus, in *Nectow v. Cambridge*, 277 U.S. 183, at 188 (1928), the Court said, "The governmental power to interfere by zoning resolutions with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare." Or, as Justice Holmes stated in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, at 415 (1922), "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Even Justice Brandeis, although disagreeing with the majority in *Pennsylvania Coal* that the regulation went too far, stated, "Furthermore, a restriction though imposed for a public purpose, will not be lawful unless the restriction is an appropriate means to the public end." 260 U.S. at 418. In achieving a synthesis from these competing standards, it is reasonable to postulate that a restriction "goes too far" when it is more restrictive than necessary, and therefore is not "an appropriate means to a public end" and "does not bear a substantial relation" to a legitimate state interest.

From February 1958 to December 1979, the applicable Zoning Resolution of Bainbridge Township required that single family residential lots have a

minimum lot size of one acre if the lot was served, like Petitioners' lands, by an approved central sewer system. The evidence at trial confirmed that one acre lots remained as of March 1986, the maximum restriction necessary to serve the avowed purpose of protecting underground water supplies.

At trial, the Township failed to introduce any evidence indicating the need to increase minimum lot sizes for single family residential use from one acre to three acres. During trial, Petitioners called William Repke, a Bainbridge Township Trustee, on cross-examination, who testified that he resides in Lake Lucerne, a near-by development, and that:

a. He was in charge of the Lake Lucerne Water Company since February of 1981.

b. The sole source of water for the Lake Lucerne Water Company is from 14 wells of which 10 are currently being pumped.

c. There are 290 homes in Lake Lucerne and the average building lot is about a third of an acre or maybe four-tenths of an acre.

d. 270 houses are served by the water system and 20 by their own wells.

e. The average daily consumption of the 270 homes served by the water system is about 225 gals. per day and the system is able to produce these needs.

f. He lived in Lake Lucerne since 1969 (17 years); sanitary sewers were not installed until 1978 or 1979, and prior thereto each house had its own septic system.

g. From 1969 until installation of sewers and enactment of three acre zoning in 1979, no problems developed with the quality of the water being pumped from Lake Lucerne wells which could be caused by the use of septic systems in that area.

h. He enjoys living in Lake Lucerne and he does not encounter any safety or health hazards from living in that proximity (4/10th acre lots) to his neighbors, nor is it an immoral environment.

Immediately to the north of Petitioners' property, in South Russell Village, is a street containing 56 single family residences constructed on one acre lots. Each home has its own well. Both Bainbridge Township and the Village of South Russell are located in Geauga County. The Director of the Geauga County Planning Commission testified at trial that he never heard of any problems with water in this area, and also testified that adequate water exists for development of Petitioners' lands on one acre residential lots.

The avowed purpose for requiring 3 acre minimum lot sizes for single family residential use is set forth in Section 6-D of the Bainbridge Zoning Resolution, as follows:

6D *R-3A RURAL RESIDENTIAL DISTRICT*
In accordance with Township objectives, to provide for development of lands within the community zoned for residential, in accordance with the ability of such lands to support development without central water supply and/or central sewerage disposal facilities, to prevent pollution of such lands and the underlying aquifers by excessive development, and to protect the acquifer [sic] recharge areas, the R-3A Rural Residential District is established in accordance with the following regulations:

As will be shown below, three acre minimum lot sizes are not reasonably related to the public purpose for which the three acre requirement was enacted, and therefore the three acre minimum lot size restriction violates the Fifth and Fourteenth Amendment rights of affected landowners.

Justice Scalia, writing for the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, at 835 (1987), states:

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

The Court, 483 U.S., at 836-837, goes on to state:

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.
>
> . . . If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.
>
> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.

The case at bar, similarly involves a restriction rather than outright prohibition, and invokes the same constitutional principles which governed in *Nollan*. The Respondents' three acre minimum lot size restriction is utterly unnecessary to further the ends of preventing pollution and of protecting aquifer recharge areas. Therefore, Respondents' zoning does not substantially advance a legitimate public purpose.

Once the Ohio Supreme Court determined that Ohio's Township Zoning Enabling Act included protection of the private underground water supply as an authorized purpose of township zoning, the Court then

needed to determine whether the applicable three acre minimum lot size restriction substantially advanced that purpose. *Nollan v. California Coastal Commission, supra.* Instead, after the Supreme Court of Ohio determined that protection of the underground water supply was authorized, it failed to rationally consider the relationship between ends and means. Thus, the Court substituted no scrutiny for even the least obtrusive test of minimal scrutiny.

The Ohio Supreme Court's discussion of the needed relationship went as follows:

In part II B of its Opinion the Ohio Supreme Court misinterpreted Petitioners' arguments as follows:

> Appellants contend that available groundwater resources are adequate to support the needs of the Bainwood Center project [a commercial plan for potential development which the Court previously noted was expected to ultimately employ ten thousand people]; therefore, a restriction to single-family use is not rationally related to the township's concern for preserving the underlying aquifer. (A11).

and that:

> The engineer who prepared the cost estimates for the Bainwood Center project did so on the assumption that the development would obtain its water from the city of Chagrin Falls; this raises the inference that the available groundwater would not be adequate. (A12).

The Court then went on to conclude that:

> The evidence is sufficient to support a township decision that further high-density development in northern Bainbridge Township would strain the available water supply. Appellants have failed to prove "beyond fair debate" that a restriction on use of the subject property to low-density residential use does not advance a legitimate objective of zoning. (A12).

The Ohio court failed to apply even minimal scrutiny because it used potential *commercial* water usage to defeat Petitioners' argument that three acre *residential* zoning must fail when one acre lots are the maximum restriction necessary to protect water supplies needed for *residential* development.

Bainwood Center is a commercial development that Petitioners proposed for their lands, which the Geauga County Planning Commission recommended for approval, but which was rejected by the local zoning authorities. It was not, however, fully developed as part of the evidence at trial. For instance, the trial court specifically excluded evidence of the zoning change sought by Petitioners to accommodate Bainwood Center. Yet, the Ohio Supreme Court seized on the potential of commercial development to defeat Petitioners' proof of adequate water for residential development on one acre lots.

In their motion for rehearing, Petitioners pointed out that once residential zoning of the subject property was deemed proper, the Ohio Supreme Court should have limited its analysis to water available for residential purposes in determining whether or not a three acre minimum lot size is reasonably necessary to "substantially advance a legitimate interest in the health, safety or welfare of the community." To have employed high-density commercial use of water as the evil to be guarded against in Bainbridge Township's three acre residential zoning scheme was to ignore the evidence developed at trial.

Petitioners' petition for rehearing set forth the evidence which clearly demonstrates a lack of any nexus between the purpose (protecting the underground water supply) and the means used to achieve this purpose (three acre minimum lot sizes).

A review of the evidence illustrates the errant analysis which flows when a court fails to analyze facts and instead relies on presumptions.

The unrebutted evidence shows that:

1. Central sewers are available and able to serve the subject property, since the applicable plant currently operates at 50% of capacity. Therefore pollution of lands and underlying aquifers due to the lack of central sewage disposal facilities is not pertinent; and

2. One acre residential lots are adequate to recharge the aquifer for residential purposes. More than 25 years of water studies consistently have demonstrated adequate water for one acre residential development with private wells, as follows:

A) In June, 1963 the Ohio Division of Water, at the request of the Geauga County Planning Commission prepared a Water Resources Report for Geauga County. The Ohio Division of Water stated:

> We feel that the following requirements would assure domestic ground-water supplies in all of Geauga County, with the exception of areas shown as "little or no ground water" on the (enclosed) Water Availability Map [none of which included the subject property]:
>
> Minimum lot size of one acre for homes being supplied by individual water wells. This could even be reduced to 3/4 acres, if necessary, with central sewage disposal systems.

This study was furnished to "All Boards of Geauga Township Trustees" and "All Township Zoning Commissions."

B) A 1978 map prepared by the Ohio Division of Water describes the groundwater underlying Petitioners' lands as producing between 5-15 gallons/minute, and 25-100 gallons/minute. By comparison, the average residence needs only 225-250 gallons of water per day (*i.e.*, far less than 1 gallon/minute).

C) *Guide Plan 2000*, the land use plan upon which the Township's three acre zoning was based in 1979, describes available ground water as follows:

> Bainbridge's groundwater hydrology varies depending upon the bedrock and unconsolidated formation being utilized, and generally can be classified from "good" to "excellent" for domestic uses both in terms of quality and quantity.

The Guide Plan does not state that increasing lot sizes from one acre to three acres is necessary to avoid any shortage of water.

D) A 1985 study commissioned by the Township from the Northeast Ohio Areawide Coordinating Agency (NOACA) states, "A considerable volume of information exists that pertains to the groundwater resources of Bainbridge Township. While this information varies in quality and applicability, the total body of information of potential interest is formidable." And continues, "Taken in total, this body of information provides a solid foundation upon which to build a groundwater management program." This study was not available in 1979 when the township increased minimum residential lot sizes from one acre to three acres, as it was not published until 1985. Under the section entitled "Summary of Existing Conditions": this report states that:

> Groundwater within the township is plentiful, widely available and of generally good quality. It is capable of being produced at rates sufficient for small domestic supplies virtually everywhere in the township, and at much larger rates in certain limited areas.

E) Finally, at trial, the Respondents' own expert admitted on cross-examination that adequate groundwater exists under Petitioners' lands for one acre residential development.

The above enumerated evidence shows that 3/4 acre to one acre residential lots can be adequately served with the groundwater underlying Appellants' lands. The evidence is confirmed after asking whether one acre lots will provide sufficient recharge area to replace the water being consumed by a single family household? This question is answered by the report prepared by the U. S. Geological Survey (1978) dealing with groundwater levels and chemical quality in Geauga County, Ohio, *U.S.G.S. Water-Resources Investigation 80-28*, Columbus, Ohio, quoted in NOACA'S 1985 report. The report states as follows:

> The best estimate of the average annual groundwater recharge rate that exists is that reported by USGS (1978). This rate is three to seven inches per year or 200 to 500 gallons per acre per day. This recharge rate compares to an estimated residential demand of approximately 250 gallons per household unit.

The U.S.G.S. report was issued one year prior to the date the township increased its residential minimum lot sizes throughout the township to three and five acres. Taking the mean of 200 to 500 gallons per acre per day, we get an average recharge rate of 350 gallons per acre per day. With an estimated residential demand of approximately 250 gallons per household unit, it is clear

that a one acre lot is sufficient to recharge the aquifer (350 x .75 = 262.5 gallons per day). A one acre lot would allow up to 10,890 sq. ft. to be covered by the house, patio, sidewalks and driveway and still leave 3/4 acre as the recharge area.

Based upon these sources of water information, which were the only sources available for Bainbridge Township at the time of trial, it is abundantly clear that three acre minimum residential lots are not necessary to protect the water supply under the 256 sewered acres of Bainbridge Township that Petitioners own.

C. The Just Compensation Clause of the Fifth Amendment, as Applied to the States Under the Fourteenth Amendment, is Self-Executing and Requires Compensation be Paid Whenever Private Land is Taken for a Public Purpose.

This Court held in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), that temporary regulatory takings[3] of the use of property require the payment of compensation under the self executing Just Compensation Clause of the Fifth Amendment.

Petitioners in the present case argued before the Supreme Court of Ohio that:

> Since it is clear that Appellants cannot develop their property in conformity with applicable zoning on an economically viable basis, it is clear that the subject zoning is confiscatory and ought to be declared invalid under the second prong of the test established in *Agins v. Tiburon, supra.*

[3] Petitioners conceive "temporary takings" to include those regulatory takings of the use of property which are subsequently invalidated by a Court during the time they were in effect and those permissible regulations which advance a legitimate public purpose while taking substantially all of a landowner's property rights until such time as the state either rescinds the regulation or pays compensation for a permanent taking.

The Supreme Court of Ohio, first quoted its prior decision rendered in *Valley Auto Lease v. Auburn Twp. Bd. of Zoning Appeals*, 38 Ohio St. 3d 184 (1988), that "it must be shown that the permitted uses are not economically feasible, or the regulation permits only uses which are highly improbable or practically impossible under the circumstances," then went on to hold that in order to prove that the subject restriction denied Petitioners the economically viable use of their lands, they must show that all possible uses permitted by the subject zoning are economically infeasible.

In the case at bar the trial court made this finding of fact:

> 6. Plaintiffs' real property could be subdivided into 71 lots if Plaintiffs were to meet all applicable zining [sic] and Geauga County Planning Commission Regulations. Such a subdivision would not be economically feasible.

The unrefuted evidence showed that the subject zoning would depress the fair market value of Petitioners' 250 undeveloped acres, if developed on three acre residential lots, to less than $244 per acre. This would cause the owners to suffer a loss of $1,040,193 on their investment. Respondent's three acre restriction has destroyed 94.46 percent of Petitioners' investment in their lands. It also has completely taken all of Petitioners' "distinct investment backed expectations" to profit from the development of their property. Both these factors "have particular significance" in determining when economic injuries caused by public action must be compensated by government under the Fifth Amendment's Just Compensation Clause. *Penn Central Transportation v. New York City*, 438 U.S. 104, at 123-124 (1978).

Justice Brown in his dissenting opinion below, concurred in by Holmes and Wright, *JJ.*, stated:

> Because I believe that appellants have proven that the three-acre minimum lot size deprives them of the economically viable use of their land, I respectfully dissent from Part II(C) and the judgment.
>
> Appellants presented unrebutted expert testimony that development of the subject property for single-family residence use *at the maximum allowable density* was not economically viable. The trial court made a specific factual finding in favor of appellants on this issue. It has not been challenged on appeal. Further, appellants presented unrebutted testimony indicating that use of the subject property for farming was not economically viable.
>
> On this record, the majority holds that appellants failed in their burden of proof because they presented "no evidence of economic infeasibility if the land were used for churches, schools, cemeteries, or public facilities" such as parks or government buildings. As a basis for decision, this is to substitute fantasy for reality. Highly improbable or practically impossible uses are not a valid basis for making zoning determinations. *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St. 3d 184, 186, 527 N.E. 2d 825, 827. As a matter of economic reality, the property in question is not going to be developed by appellants as a school, park, church, cemetery, or governmental building. Indeed, appellants have no authority to construct such structures and are left in the position of waiting for the unlikely prospect that some day a church or a governmental body *might* want their property. Because appellants are prevented from engaging in economically viable development, the practical effect of the three-acre minimum lot size is to render the subject property undevelopable.

The Petitioners are private individuals or corporations wholly owned by those individuals. None of the Petitioners is a church, cemetery association, public or private school, or township or other government entity. It should be obvious that a private individual does not have a reasonable investment backed expectation of his own ability to develop property for uses which he can not undertake. Thus, as Justice Brown cynically noted in the above quotation, the Ohio Supreme Court substituted "fantasy for reality" when it found the evidence fairly debatable whether Petitioners could develop their lands for any of the alternate, secondary uses permitted by Respondents' zoning.

With the cooperation of Ohio's Supreme Court, Respondents have taken Petitioners' personal, fundamental right to develop their lands on an economically viable basis. Assuming, for instance, the viability of developing Petitioners' lands as a 256 acre church, Respondents' zoning compels a change of ownership to permit such development.

There is no more fundamental property right than the right of private ownership. The decisions below effectively take that right from Petitioners without compensation by compelling a change of ownership as a condition of development.

Petitioners therefore urge this Honorable Court to accept this appeal for the additional purpose of declaring that uses which are "highly improbable or practically impossible uses," are *per se* not economically viable uses of land, especially when those uses require a change of ownership for development.

Not only are public buildings, parks, churches, schools and cemeteries facially improbable uses, and inherently confiscatory by the public nature of their use, but the evidence introduced at trial showed them to be economically non viable.

The trial record indicates that Petitioner Rice's 90 acre part of the subject property was continually offered for sale from 1981 through the date of trial (a period of approximately five years). No offer to purchase all or any part of the property was received during this five year period for any purpose, let alone from any church group, public or private school, public or private cemetery association, or any township, county, state or federal governmental body or agency wanting to acquire the property for the construction of a public facility.[4] As a matter of common sense and economic logic, this fact constitutes *prima facie* proof that there is no market or demand for the non-residential uses permitted in the subject R3-A residential district. The non-existent market for property to be used for churches, schools, cemeteries or public facilities renders all these uses economically unrealistic and therefore infeasible. *Forrest v. Evershed*, 7 N.Y.2d 256 (1959). On the other hand, there was during this same period of time (1980 through 1985) a very active market in non-sewered parts of the township for other types of land use permitted by zoning. In his expert appraisal report, admitted in evidence below, Wesley Baker lists ten residential acreage sales, eleven commercial light industrial land sales, and five multi-family and condominium land sales elsewhere. All these sales were of raw, undeveloped lands.

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[4] Prior to the township's adoption of three acre zoning in 1979, the owner and eventual settlor of the Rice trust had given an option on the property for its purchase by a major Cleveland-based developer. Forest City Development allowed its option to expire without renewal after lot sizes were enlarged from one to three acres. Rice, as Trustee, thereafter offered the property for sale to the public.

Clearly there was general market activity elsewhere in the township during the relevant five year period of time, but not a single offer ever was received on the Rice lands. Against this evidence, a presumption of commercially viable development for public buildings, parks, churches, schools and cemeteries indulges the boldest of fictions.

Thus, the facts of the subject case offer a rare opportunity for this Court to distill its prior pronouncements in Takings Clause cases into a comprehensive statement of law. Bench, bar, land owners, developers, government officials and the public at large deserve a concise statement of law upon which to base planning and development decisions. This case contains the elements needed to fashion such a statement. And on the facts of the subject case, Petitioners submit that the economic infeasibility proved below, standing alone, required a declaration of unconstitutional zoning.

D. A Court Should Not Rely on a Presumption of Legislative Validity in Determining Whether a Land Use Regulation Substantially Advances the Legitimate State Interest it was Enacted to Effectuate—The Court Must Factually Determine Whether the Restriction Advances the Legitimate State Interest.

This Court has long held that when the reasonableness of a zoning restriction is fairly debatable this Court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. *Zahn v. Board of Public Works of the City of Los Angeles,* 274 U.S. 325, 328 (1927); *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928). Under Ohio practice, properly enacted zoning resolutions are presumed to be valid. Therefore, the burden of proving the unconstitutionality of a zoning restriction is upon the property owner. *Leslie v. Toledo,* 66 Ohio St. 2d 488 (1981); *Brown v. Cleveland,* 66 Ohio St. 2d 93 (1981); *Hilton v. Toledo,* 62 Ohio St. 2d 394 (1980); *Willott v. Beachwood,* 175 Ohio St. 557 (1964).

Appellants suggest that the Court, considering its recent holding in *Nollan v. California Coastal Commission,* may wish to modify its 1927 and 1928 decisions rendered in *Zahn* and *Nectow, supra.*

In *Nollan v. California Coastal Commission, supra,* this Court held that in order for a land use regulation to be constitutional there first must be a "legitimate state interest" justifying the enactment of the restriction, and second, that the land use regulation must reasonably effectuate that legitimate state interest.

Whether a legitimate state interest exists, is primarily a legislative determination. Therefore, when a landowner challenges the validity of the "legitimate state interest" the landowner, in order to prevail, should have the burden of proving that the interest is not legitimate beyond the reach of fair debate. However, whether or not

the land use restriction enacted substantially effectuates the legitimate state interest is primarily a factual determination which courts historically are well-suited to perform. In determining facts, courts need not defer to any presumption of reasonable relationship between purpose and means. The legislative body enacting the restriction should be required to factually demonstrate within the reach of fair debate, if not by a preponderance of the evidence, that the restriction substantially advances the legitimate state interest.

Therefore, in every case challenging the constitutionality of a zoning restriction the court should first determine whether or not there is a "legitimate state interest" to be served by the zoning restriction. If the court finds that a legitimate government purpose exists, the court should then determine whether the zoning restriction enacted substantially advances the legitimate state interest. In determining the latter, the court should not rely solely on a presumption of legislative validity. The court must determine from the evidence that the restriction, within the reach of fair debate or otherwise, substantially advances the legitimate state interest.

Thus, whenever the landowner challenging the restriction presents uncontroverted probative evidence that the restriction does not substantially advance the legitimate state interest, any presumption of legislative validity ought to be held overcome. *Board of Supervisors of Fairfax County v. Snell Construction Corporation*, 214 Va. 655 (1974); *Rea v. City of Cordele*, 255 Ga. 392 (1986); *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558 (1970). In such a case, before the court may sustain the restriction, the zoning authority must come forward and present evidence that shows at least within the reach of fair debate that the restriction does in fact substantially advance the legitimate state interest.

In the case at bar, the township introduced no evidence that it was reasonably necessary to increase the minimum residential lot size in order to "prevent pollution." The restriction itself is facially unrelated to the purpose of "preventing pollution of such lands" as the restriction does not permit a lesser minimum lot size when the lot is serviced by "central sewerage disposal facilities" than when the lot is served by an on site septic system. The 1958 Resolution, which the amended restriction superceded, contained such a flexible restriction, but in 1979 flexibility was discarded in favor of rigid anti-development animus.

So also in this case, the township did not introduce any evidence that on the date of enactment or at the time of trial the increase in minimum lot sizes was reasonably necessary "to protect the acquifer [sic] recharge areas." In fact, the restriction ignored public studies conducted in 1963, 1978 and 1985 to the effect that 3/4 acre housing densities could be adequately supplied by individual water wells in sewered areas of Geauga County, such as those owned by Petitioners.

As indicated at pages 16-18, *supra*, these studies indicate that "Groundwater within the township is plentiful, widely available and of generally good quality," that the average residential demand is approximately 250 gallons per day per household, and that the mean average aquifer recharge rate is 350 gallons per acre per day. Based on this evidence, the township's own expert acknowledged one acre densities would adequately serve Bainbridge Township's water needs.

The township clearly failed to prove within the reach of fair debate that three acre minimum residential lot sizes were reasonably necessary to prevent pollution of the aquifer in Petitioners' sewered area of the township or reasonably related to protecting aquifer recharge areas. In fact a three acre lot is 300% of the maximum restriction necessary.

Petitioners respectfully submit that when the zoning regulations permitted one acre residential minimum lots for over twenty years and no problems arose as a result thereof, and when all of the scientific studies undertaken before and after the township increased the minimum lot size from one to three acres, indicate adequate water for one acre development, such an increase is *prima facie* arbitrary and unreasonable and precludes any judicial presumption of legislative validity.

Had the Supreme Court of Ohio performed the necessary inquiry as to whether the restriction failed to substantially advance the avowed public purpose of preventing pollution of the aquifer and protecting aquifer recharge areas as mandated by this Court in *Nollan*, the court would have had to declare the three acre restriction unconstitutional.

CONCLUSION

The two-pronged conjunctive test for determining the unconstitutionality of a zoning resolution adopted by the Ohio Supreme Court, coupled with its pronouncement that each and every use permitted by the zoning classification must be shown to deny a landowner economically viable use of his or her land, effectively closes the door to bringing Fifth Amendment Just Compensation claims in Ohio courts and thus forces Ohio property owners to bring their actions in the already overburdened Federal District Courts. The Ohio Supreme Court's holdings also expose local zoning authorities that rely thereon to the risk of considerable financial loss from temporary taking claims based upon this Court's decisions in *Nollan, First English,* and *Agins.*

Petitioners have invested over One Million Dollars in their property. The Supreme Court of Ohio has sanctioned an overly restrictive zoning resolution which prevents Petitioners from developing their property for any practical economically viable use and completely destroys Petitioners' reasonable investment backed expectations for the development of their property. The Ohio Supreme Court's holding precludes Petitioners from obtaining just compensation in Ohio courts for such taking. It sanctions taking Petitioners' fundamental right to develop their own lands without a change of ownership.

Petitioners therefore request this Court to grant certiorari to clarify the legal standards under which the Fifth and Fourteenth Amendments will be utilized in determining whether a restriction substantially advances the legitimate state interest underlying its enactment and to determine the degree of economic infeasibility or interference with a landowner's reasonable investment backed expectation which requires payment of just compensation under the Fifth Amendment's Taking

Clause. A decision granting relief to Petitioners would effectively instruct Ohio courts that when considering a Fifth Amendment Just Compenstion Taking Claim they are to apply the two-pronged disjunctive test announced by this Court in *Agins*, rather than the two-pronged conjunctive test applied by the Ohio Supreme Court in the case at bar.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided July 18, 1990)

No. 89-693

THE SUPREME COURT OF OHIO

GAETANA R. KETCHEL, *et al.*,
Appellants,

v.

BAINBRIDGE TOWNSHIP, *et al.*,
Appellees.

[Cite as *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St. 3d 239]

Townships—Zoning—Township trustees may set minimum lot sizes—R.C. 519.02—Local zoning authority may consider conservation of underground water resources when adopting zoning regulations.

O.Jur. 3d Buildings etc. §§164, 166, 222.

1. Township trustees may set minimum lot sizes in the exercise of the zoning authority conferred by R.C. 519.02 (*State, ex rel. Bugden Development Co., v. Kiefaber* [1960], 113 Ohio App. 523, 18 O.O. 2d 169, 179 N.E. 2d 360; *State, ex rel. Grant v. Kiefaber* [1960], 114 Ohio App. 279, 19 O.O. 2d 207, 181 N.E. 2d 905, affirmed [1960], 171 Ohio St. 326, 14 O.O. 2d 3, 170 N.E. 2d 848; and 1970 Ohio Atty. Gen. Ops. No. 70-074, approved.)

2. A local zoning authority may consider the conservation of underground water resources when adopting zoning regulations.

APPEAL from the Court of Appeals
for Geauga County, No. 1330.

This case concerns a challenge to the Bainbridge Township Zoning Resolution by the owners of a two hundred fifty-six-acre tract of mostly undeveloped land southeast of the city of Chagrin Falls.

The Subject Property

The subject property lies along the township's northern border between two major highways just north of an intersection known as McFarland's Corners. A portion of the Bainbridge Township zoning map, showing the location of the subject property, is appended to this opinion.

The property is bordered on the north by Chagrin Lakes, a residential subdivision made up of one-acre lots in the village of South Russell in Russell Township. State Route 306, a north-south highway, runs along the eastern boundary of the subject property. At the time of trial, Washington Road, a.k.a. E. Washington Street on the southwest boundary, was U.S. Route 422.[1] On the southern side, the property borders on a small factory, a condominium complex, and a former drive-in movie theatre.[2] A high-voltage power line crosses the western part of the subject property. A trunk sewer line runs beneath the middle of the property, north to south.

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[1] According to appellants' brief, U.S. Route 422 has since been relocated south to a new limited-access divided highway.

[2] Appellants state in their brief that the drive-in is now being replaced by a six-screen indoor movie theatre.

Going beyond the adjacent properties, there has been considerable non-residential development along Washington Road northwest of McFarland's Corners. Also there has been development in an industrial park south of the highway. These areas are zoned for commercial and light industrial uses. Lake in the Woods, a residential sub-division of one and one-half-acre lots, is located along Route 306 just southeast of the subject property. Other nearby property is used for residences, farming, and a church.

Ownership of the subject property is divided among the appellants.

The Zoning Resolution

Prior to 1979, the property was zoned "R-1 Residence District," which permitted single-family residences on one or one and one-half-acre lots. Effective December 5, 1979, the township zoning resolution was amended to reclassify the property to "R-3A Rural Residential District." The R-3A classification restricts the use of the subject property to agriculture, single-family dwellings, churches, schools, public recreation, governmental buildings, and cemeteries. It establishes a minimum lot size of three acres (130,680 sq. ft.), and a minimum width of two hundred feet, for any lot on which a building is erected.

The Bainwood Center Zoning Proposal

On August 23, 1984, appellants petitioned to amend the zoning resolution to reclassify the subject property as a "Multi-Use District." The multi-use zoning would have allowed Edwin J. Ketchel, the husband of appellant Gaetana R. Ketchel, and his associates to construct "Bainwood Center" on the property. Bainwood Center

would feature "massed open space," with permitted uses, including light industry, retail stores, restaurants, nursing homes, and multi-family dwellings, "inter-mixed and integrated to create a well-balanced living environment." Mr. Ketchel estimated that Bainwood Center would ultimately employ ten thousand people.

The proposed amendment received a favorable recommendation from the Geauga County Planning Commission. Despite this recommendation, the Bainbridge Township Trustees refused to adopt the amendment.

The Litigation

Appellants brought an action in the Court of Common Pleas of Geauga County seeking to declare the R-3A zoning classification unconstitutional. After a three-day trial, the court held the zoning constitutional and entered judgment for appellees. This judgment was affirmed by the court of appeals in a split decision.

The cause is before this court pursuant to the allowance of a motion to certify the record.

Edwin J. Ketchel, Thomas & Boles and *Stephen G. Thomas*, for appellants.

Forrest W. Burt, assistant prosecuting attorney, for appellees.

ALICE ROBIE RESNICK, *J.* This case tests both the township's power to zone and the validity of the zoning resolution it adopted. For the reasons which follow, we hold the zoning resolution valid as applied to the property in question.

I

The Power of Bainbridge Township to Zone

Because they have no inherent or constitutional police power, townships have only the zoning power delegated to them by the General Assembly. *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 351, 2 O.O. 2d 255, 256, 142 N.E. 2d 655, 656. The General Assembly has delegated this power to township trustees through R.C. 519.02, which provides:

"For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones."

A

Minimum Lot Sizes

Appellants initially contend that the Bainbridge Township Zoning Resolution is invalid because R.C. 519.02 gives township trustees no authority to set minimum lot sizes. They point to R.C. 711.05, one of the statutes, governing the recording of subdivision plats, which provides in pertinent part:

"The board may adopt general rules governing plats and subdivisions of land *** for the avoidance of future congestion of population detrimental to the public health, safety, or welfare but shall not impose a greater minimum lot size than forty-eight hundred square feet."

Appellants assert that this statute gives exclusive authority to set minimum lot sizes to the county commissioners. They further argue that, by virtue of this statute and R.C. 711.09 (which governs villages and cities and contains similar language), *no* local zoning authority anywhere in Ohio may set a minimum lot size greater than 4,800 square feet, which is a little more than one tenth of an acre. We do not agree.

R.C. 519.02 does not contain the specific words "lot size." However, R.C. 519.02 does empower the board of township trustees to regulate population density. The establishment of minimum lot sizes is a "commonly approved technique" for achieving this objective. *State, ex rel. Grant, v. Kiefaber* (1960), 114 Ohio App. 279, 292, 19 O.O. 2d 207, 215, 181 N.E. 2d 905, 915, affirmed (1960), 171 Ohic St. 326, 14 O.O. 2d 3, 170 N.E. 2d 848.

Further, R.C. 519.02 expressly grants the power to regulate the "size of *** buildings and other structures, *** percentages of lot areas which may be occupied, set back building lines, [and] sizes of yards, courts, and

other open spaces ***. Even if we were to hold that the statute does not empower the township trustees to set a minimum lot size, the township trustees could follow the statute literally to create a *de facto* minimum lot size requirement by setting a minimum building size, a minimum yard size, and a maximum percentage of occupancy. The General Assembly could not have intended to withhold the power to regulate lot size directly while granting the power to do so indirectly.

Finally, we reject the argument that R.C. 711.05 grants county commissioners the exclusive authority to set lot sizes. The statutes in R.C. Chapter 711 govern the recording of plats. Plats are recorded, not as a means of regulating land use, but as a part of the process of subdividing and conveying land. See, generally, 35 Ohio Jurisprudence 3d (1982), Dedication, Section 46. The platting process is initiated by the actions of landowners and not by local government. The platting statutes are not a substitute for zoning.

Accordingly, we adopt the position long held by Ohio legal authorities, see *Grant, supra; State, ex rel. Bugden Development Co. v. Kiefaber* (1960), 113 Ohio App. 523, 18 O.O. 2d 169, 179 N.E. 2d 360; 1970 Ohio Atty. Gen. Ops. No. 70-074; see, also, *Reed v. Rootstown Twp. Bd. of Zoning Appeals* (1984), 9 Ohio St. 3d 54, 9 OBR 260, 458 N.E. 2d 840 (approving five-acre minimum lot size imposed by township), and hold that township trustees may set minimum lot sizes in the exercise of the zoning authority conferred by R.C. 519.02.

B

Conservation of Water Resources

The Bainbridge Township Zoning Resolution states that the purpose of the R-3A zoning classification is to "provide for the development of lands *** in accordance with the ability of such lands to support development without central water supply and/or central sewerage disposal facilities, to prevent pollution of such lands and the underlying aquifers by excessive development, and to protect the aquifer recharge areas ***." Appellants claim that the protection of groundwater resources is not a legitimate objective of zoning.

Relying on *Cline v. American Aggregates Corp.* (1984), 15 Ohio St. 3d 384, 15 OBR 501, 474 N.E. 2d 324, appellants contend that landowners have an absolute right to use groundwater without concern for the consequences to neighboring landowners. Because the stated purpose of the R-3A zoning classification is to protect the underlying aquifers, appellants argue that a portion of their lands is essentially being dedicated to replenishing their neighbors' water supply while their own right to use groundwater is unconstitutionally restricted.

We find this position untenable. The purpose of zoning is, in part, to protect public health and safety. *E.g.*, R.C. 519.02. An adequate supply of safe water for domestic use is vital to public health. Bainbridge Township has a legitimate interest in assuring that its residents are not faced with a shortage of pollution-free water. This is a proper objective of zoning.

Nor does the consideration of water resources effect an unconstitutional restriction on appellant's riparian rights. Under ancient Ohio law, as stated in *Frazier v.*

Brown (1861), 12 Ohio St. 294, a landowner was not liable for harm resulting from the landowner's use of groundwater. However, *Cline, supra*, overruled *Frazier*, adopting a rule which imposes liability on a landowner whose use of groundwater unreasonably interferes with the water rights of another. *Cline, supra*, at syllabus. Thus, *Cline* supports the view that groundwater is a resource which must be conserved and protected. Accordingly, we hold that a local zoning authority may consider the conservation of underground water resources when enacting zoning regulations.

Finally, appellants seem to argue that the Bainbridge building and lot size restrictions create a sort of mandatory public easement, for rainwater to soak into their property and replenish the aquifer. This is not so. While appellants are prohibited from completely covering their property with buildings, the minimum lot size, minimum yard size and maximum percentage of occupancy requirements of which appellants complain do not prevent them from using all of their land for residential purposes. No taking for public purpose has occurred.

II

Validity of the Zoning Resolution as Applied to the Subject Property

As with all legislative enactments, zoning regulations are presumptively constitutional. *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93, 95, 20 O.O. 3d 88, 89, 420 N.E. 2d 103, 105. In order to invalidate a zoning regulation on constitutional grounds, the parties attacking it must demonstrate, beyond fair debate, that the zoning classification denied them the economically viable use of their land without substantially advancing a legitimate

interest in the health, safety, or welfare of the community. *Karches v. Cincinnati* (1988), 38 Ohio St. 3d 12, 19, 526 N.E. 2d 1350, 1357; *Mayfield-Dorsh, Inc. v. South Euclid* (1981), 68 Ohio St. 2d 156, 22 O.O. 3d 388, 429 N.E. 2d 159; *Brown, supra; Superior Uptown v. Cleveland* (1974), 39 Ohio St. 2d 36, 68 O.O. 2d 21, 313 N.E. 2d 820; see, also, *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104; *Goldblatt v. Hempstead* (1962), 369 U.S. 590; *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. The fact that the land has been rendered less valuable by zoning, taken alone, is insufficient; it must be shown that "the permitted uses are not economically feasible, or the regulation permits only uses which are highly improbable or practically impossible under the circumstances." *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St. 3d 184, 186, 527 N.E. 2d 825, 827.

Appellants attack the Bainbridge Township Zoning Resolution on the ground that the use restrictions and the three-acre minimum lot size are not rationally related to a legitimate public interest and deprive them of any economically viable use.

A

Residential Use Classification

The R-3A zoning classification restricts the use of the subject property to agriculture, single-family dwellings, churches, schools, public recreation, governmental buildings, and cemeteries. Appellants claim that this restriction is unconstitutional because the subject property is surrounded by business and industrial uses, fronts on busy highways, and is crossed by power lines, thus rendering it unsuitable for residential use.

The record does not support this characterization of the subject property as a residential "island" surrounded by a "sea" of incompatible commercial and industrial uses. While there is commercial and industrial development along Washington Street (in areas zoned for those uses), most of the nearby area in Bainbridge Township is zoned R-3A and used for farming or single-family residences. The area of the village of South Russell adjacent to the property is likewise used for single-family residences. Indeed, the township zoning map (Appendix A) reveals that the commercial and industrial areas which appellants claim surround the property are themselves surrounded by property zoned for residential use. The subject property may be more valuable if used for commercial and industrial purposes. But appellants have failed to show: (1) that the character of the surrounding area is such that a restriction to residential uses renders the development of their property economically infeasible, or (2) that the reasonableness of a residential use restriction is not fairly debatable. See *Nectow v. Cambridge* (1928), 277 U.S. 183, 187-188.

B

Groundwater Supplies

Appellants contend that available groundwater resources are adequate to support the needs of the Bainwood Center project; therefore, a restriction to single-family use is not rationally related to the township's concern for preserving the underlying aquifer.

The record contains much evidence on the question of groundwater supplies. A 1978 groundwater resource survey based on well drillers' logs indicates that the subject property has water "[s]uitable for central

supplies for small to moderate-sized subdivision development." Appellants presented testimony that Lake Lucerne, a nearby subdivision consisting of single-family residences on lots as small as a third of an acre, has an adequate supply of water from ten wells owned by the Lake Lucerne Water Company. However, appellees elicited testimony from the same witness that Lake Lucerne's wells were producing at only twenty-five percent of the capacity indicated by the well drillers' logs. The engineer who prepared the cost estimates for the Bainwood Center project did so on the assumption that the development would obtain its water from the city of Chagrin Falls; this raises the inference that the available groundwater would not be adequate.

We need not determine whose characterization of the water supply is more accurate. The evidence is sufficient to support a township decision that further high-density development in northern Bainbridge Township would strain the available water supply. Appellants have failed to prove "beyond fair debate" that a restriction on use of the subject property to low-density residential use does not advance a legitimate objective of zoning.

C

Three-Acre Minimum Lot Size

Damon A. Braun, a licensed engineer, prepared a "conceptual drawing" ("the Braun plan") showing the subject property divided into seventy-one three-acre residential lots in accordance with the requirements of the R-3A zoning classification. Braun also prepared a summary of engineering costs which would be incurred in developing the land according to this plan.

Wesley E. Baker, an independent real estate appraiser, prepared an estimate of the value of the property. He estimated the net fair market value of the property, if developed according to the Braun plan, at $61,000 if the lots sold within five years, and a negative $6,000 if they sold in six years. By contrast, the estimated net fair market value of the land if developed pursuant to the Bainwood Center proposal was $1,333,000.

The R-3A zoning classification restricts the use of the property to agriculture, single-family dwellings, churches, schools, public recreation, governmental buildings, and cemeteries. Appellants demonstrated that use of the property for single-family residences at the maximum possible density permitted under the zoning at issue (after allowing for access roads) was not economically viable. The trial court specifically found that subdivision of the property "would not be economically feasible" under the three-acre minimum zoning restriction.[3] Appellants presented no evidence of economic infeasibility if the land were used for churches, schools, cemeteries, or public facilities. However, appellants did present some testimony tending to show that use of the property for farming is not economically viable.[4]

Appellees and the courts below concluded that appellants did not meet their burden of proof because they did not show that *all* possible uses were

[3] The trial court made this finding of fact:

"6. Plaintiff[-appellant]s' real property could be subdivided into 71 lots if Plaintiffs were to meet all applicable zining [sic] and Geauga County Planning Commission regulations. Such a subdivision would not be economically feasible."

[4] Appellant Eugene Muggleton testified that he purchased seventeen acres in 1972 for $25,500. This property was rented out for farming for $85 per year at the time of trial.

economically infeasible. We agree. A party challenging a zoning ordinance has, at all stages of the proceedings, the burden of showing the unconstitutionality or unreasonableness of the ordinance. See *Mayfield-Dorsh, Inc. v. South Euclid, supra*, at 157, 22 O.O. 3d at 389, 429 N.E. 2d at 161. While the record here contains some evidence that appellants would be unable to economically use their property for single-home development, the record also shows that high-density development in northern Bainbridge Township might strain the available water supply. Thus appellants have not shown beyond fair debate that the minimum lot size requirement is unconstitutional, unreasonable and not substantially related to the public health or safety and have not "unambiguously demonstrate[d], with massive amount of evidence, the invalidity of a zoning classification mandat[ing] meaningful judicial review." *Mayfield-Dorsh, Inc., supra*, at 159, 22 O.O. 2d at 390, 429 N.E. 2d at 162.

A reviewing court must be very reluctant to substitute its judgment for that of the body responsible for applying zoning ordinances.

"The determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance, to the judgment and discretion of the legislative body. Where such a judgment deals with the control of traffic, volume of traffic, burden of traffic, effect upon valuation of property, municipal revenue to be produced for the city, expense of the improvement, *land use consistent with the general welfare and development of the community as a whole, or, in short, where the judgment is concerned with what is beneficial*

or detrimental to good community planning, it is in the first instance a legislative and not a judicial matter. The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable." (Emphasis added.) *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560, 26 O.O. 2d 249, 251, 197 N.E. 2d 201, 204.

There is sufficient evidence to show that the three-acre minimum lot size is necessary in order to protect public health and safety in this section of Bainbridge Township. Accordingly, we will not substitute our judgment for that of the Bainbridge Township Trustees, and thus hold that the minimum lot size requirement of the R-3A zoning classification is valid as applied to the subject property.

D

Conclusion

The record supports a township decision that the use of the property should be restricted to agriculture, single-family dwellings, churches, schools, public recreation, governmental buildings, and cemeteries, and that the density of population on the property should be limited to conserve the water supply. The record also supports a determination that a three-acre lot requirement advances a legitimate interest in the health, safety, or welfare of the community.

Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, *C.J.*, SWEENEY and DOUGLAS, *JJ.*, concur.

HOLMES, WRIGHT AND H. BROWN, *JJ.*, concur in part and dissent in part.

H. BROWN, *J.*, concurring in part and dissenting in part. I concur in the syllabus and in Parts I, II(A), and II(B) of the majority opinion. Because I believe that appellants have proven that the three-acre minimum lot size deprives them of the economically viable use of their land, I respectfully dissent from Part II(C) and the judgment.

Appellants presented unrebutted expert testimony that development of the subject property for single-family residence use *at the maximum allowable density* was not economically viable. The trial court made a specific factual finding in favor of appellants on this issue. It has not been challenged on appeal. Further, appellants presented unrebutted testimony indicating that use of the subject property for farming was not economically viable.

On this record, the majority holds that appellants failed in their burden of proof because they presented "no evidence of economic infeasibility if the land were used for churches, schools, cemeteries, or public facilities" such as parks or government buildings. As a basis for decision, this is to substitute fantasy for reality. Highly improbable or practically impossible uses are not a valid basis for making zoning determinations. *Valley Auto Lease of Chagrin Falls, Inc. v. Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St. 3d 184, 186, 527 N.E. 2d 825, 827. As a matter of economic reality, the property in question is not going to be developed by appellants as a school, park, church, cemetery, or government building. Indeed, appellants have no

authority to construct such structures and are left in the position of waiting for the unlikely prospect that some day a church or a governmental body *might* want their property. Because appellants are prevented from engaging in economically viable development, the practical effect of the three-acre minimum lot size is to render the subject property undevelopable.

The record reveals that two nearby subdivisions were developed on smaller lots, apparently without adverse effects on the groundwater supply. Thus, while the township is justified in restricting the density of development, the large lot size imposed by the R-3A zoning classification is not necessary. I would invalidate the three-acre minimum lot size as applied to the subject property and direct the township to rezone the property in conformity with the zoning applicable to surrounding properties.

HOLMES and WRIGHT, *JJ.*, concur in the foregoing opinion.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated July 18, 1990)

Case No. 89-693

THE SUPREME COURT OF OHIO

GAETANA KETCHEL, *et al.*,
Appellants,

v.

BAINBRIDGE TOWNSHIP, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Geauga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellees recover from the appellants their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Geauga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Geauga County for entry.

(Court of Appeals No. 1330)

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Dated July 18, 1990)

Case No. 89-693

THE SUPREME COURT OF OHIO

GAETANA KETCHEL, *et al.*,
Appellants,

v.

BAINBRIDGE TOWNSHIP, *et al.*,
Appellees.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Geauga, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE COURT OF APPEALS UPON RECONSIDERATION

(Filed March 6, 1989)

Case No. 1330

COURT OF APPEALS

ELEVENTH DISTRICT
GEAUGA COUNTY, OHIO

GAETANA R. KETCHEL, *et al.*,
Plaintiffs-Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants-Appellees.

HON. JUDITH A. CHRISTLEY, *P.J.*
HON. DONALD R. FORD, *J.*
HON. EDWARD A. COX, *J.*
Seventh Appellate District
Sitting by assignment

CHARACTER OF PROCEEDINGS:
Civil appeal from Geauga County Common Pleas Court Case No. 85 M 480

JUDGMENT:
AFFIRMED.

OPINION UPON RECONSIDERATION

CHRISTLEY, *P.J.*

This action is presently before this court for reconsideration of the judgment entered on May 6, 1988 as to the first assignment of error only.

Appellants are owners of approximately two hundred fifty-six acres of real property located in Bainbridge Township, Geauga County, Ohio. The property has been designated R-3A under a comprehensive plan, *Guide Plan 2000,* which was adopted by the township. As zoned, appellants' land is limited to the following uses: agriculture, single family dwellings on lots of a minimum of three acres with a width of at least 200 feet, places of worship, public and private schools, public parks or other public recreation facilities, governmental buildings and cemeteries. The property is divided and owned or titled to several persons and entities.

Appellants joined in filing an amendment to the zoning resolution in order to rezone the residential property into multi-use property. This would allow commercial development which, in turn, would increase the value of the land to appellants. The proposed amendment, pursuant to R.C. 519.12, was referred to the Geauga Planning Commission which recommended that the township adopt it, with modifications. The township did not adopt the amendment.

Appellants filed a complaint in the Common Pleas Court of Geauga County, Ohio, requesting that the court find the present zoning restriction of their property to be unreasonable and thus void and unenforceable. Appellants further requested that the court order a directive to the trustees of Bainbridge Township that they rezone appellants' property according to their request for a multi-use designation within sixty days. Failure to do so would allow appellants to use their land in accordance with the use recommended by the Geauga Planning Commission.

The case was heard on June 16, 1986. The court found in favor of the appellees. Appellants filed a timely notice of appeal with the following assignments of error:

I. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in granting judgment for the defendants on the basis that legislative enactments are presumed valid and if reasonably debatable on the facts may not be judicially stricken or modified when the court found as a fact that it would not be economically feasible to develop the property for the primary purpose permitted by the zoning resolution and there was substantial uncontroverted evidence in the record to show that the zoning resolution was not related to the public health, safety or morals.

II. The trial court erred in not holding, as a matter of law, that the Bainbridge Township Zoning Resolution, was arbitrary and unreasonable as applied to plaintiffs' property for the reason that it is not in accordance with the Township's Comprehensive Plan, *Guide Plan 2000.*

III. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in not holding, as a matter of law, that a Township Zoning Resolution prescribing minimum lot sizes of three acres in order to preserve the natural quality of the landscape is void and unenforceable.

IV. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in not holding, as a matter of law, that the provision of the Bainbridge Township Zoning Resolution requiring a minimum lot size of three acres is void and unenforceable.

V. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in not holding, as a matter of law, that Township-Trustees may not enact a zoning resolution for the purpose of preventing pollution of land and the underlying aquifers or to protect aquifer recharge areas.

VI. The Court of Common Pleas erred to the prejudice of the taxpayers plaintiffs-appellants in dismissing the fifth cause of action set forth in the complaint upon finding that plaintiffs' evidence has not shown any right to relief as to the taxpayer's action claim (R. 532).

Appellants' first assignment of error is not well taken.

In challenging the constitutionality of a zoning ordinance, the party making the challenge is faced with a heavy burden in any attempt to invalidate an existing zoning classification. Zoning ordinances enacted pursuant to the police powers of a governmental entity are presumed to be valid until the contrary is clearly shown by the party attacking the ordinance. *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93; *Mayfield-Dorsh, Inc. v. South Euclid* (1981), 68 Ohio St. 2d 156, 157. The burden of demonstrating the unconstitutionality or unreasonableness of a zoning restriction, at all stages of litigation, rests with the property owner making the challenge. *Leslie v. Toledo* (1981), 66 Ohio St. 2d 488, 489; *Brown v. Cleveland, supra*, at 95.

In order for a property holder to prevail, it must be demonstrated to the court that the zoning provision is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals, or general welfare. *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395. The evidence must be sufficient to take the matter beyond the reach of fair debate. *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23. When the validity of the zoning ordinance is found to be fairly debatable, the court will not substitute its judgment for that of the legislature or the people. *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560. The

validity of a zoning restriction as applied to particular property is fairly debatable if reasonable minds may differ. *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34, 51. The fairly debatable rule must concern itself with basic *physical facts* pertinent to the issue of the validity of the zoning ordinance and not with mere words or differing opinions. *Id.*

Upon reviewing the transcript and exhibits in the instant case, the lower court ruled that appellants failed to meet their burden of proving that the zoning of their property was beyond the reach of fair debate.

For example, much of the trial testimony focused on the availability of water to the area. Appellants' experts relied primarily on studies which were not "site specific" in terms of well water availability. There was also testimony that some of these studies were not reliable in terms of how much well production could be anticipated. It was also clear that assumptions had been made by appellants that water service could be contracted for with neighboring municipalities when no such agreements were contemplated or in existence.

There was also much made of the presence of CEI power transmission lines on part of the property. However, no specific evidence was presented as to their exact effect on either the property as presently zoned or as proposed. There was testimony solicited that there were other developments which had apparently been able to utilize residential lots bordering by CEI lines.

Appellants' experts, when pinned down, could not state with certainty that the character of the area was currently changing. When they were questioned about specific current nonresidental uses, it became apparent

that almost all of those uses were either preexisting uses or allowable under the present R-3, such as the seasonal farm market.

Therefore, there is nothing in the record to persuade this court to reverse the lower court's decision as being against the manifest weight of evidence.

As a further issue in the first assignment, appellants allege two specific faults with the zoning resolution as it relates to their property, to-wit: that the resolution does not promote or protect the public health, safety, or morals.

In support of their contention, appellants cite *Mayfield-Dorsh, supra.* Although this case cited does relate to facts similar to those in the present case, there are facts that distinguish the two cases.

In *Mayfield-Dorsh,* the property owners sought to have their property rezoned from single-family to multi-family development in order to build condominiums. The court in *Mayfield-Dorsh, supra,* found that the proposal for the development of condominiums was harmonious with the surrounding property since testimony from the Mayor of South Euclid was to the effect that the area surrounding the 3.45 acre tract had not maintained an essentially residential character. That relevant portion of the mayor's testimony was provided and reads as follows:

> "Q. Now, you stated that it is not reasonable.
>
> A. It might be unreasonable to have this single-family usage, right, or single-facility lots on Mayfield Road, *considering the change and character of Mayfield Road over the years.****"
> *Mayfield-Dorsh, supra,* at 158, fn. 2 (Emphasis in original.)

In the present case, the record demonstrated that the area surrounding appellants' property has not substantially changed since the original zoning ordinance was adopted. As presently situated, appellants' property is bounded to the north by a residential development, to the west by a residential district which includes a rental company (a nonconforming use) which was in existence prior to the zoning ordinance, to the south is Knowles Industrial Park in a nonresidential district, and to the east by a zoned residential district containing several commercial establishments also in existence prior to the zoning ordinance (Plaintiff's Exhibit 26, *Guide Plan 2000*). Thus in comparing the two cases, the court found in *Mayfield-Dorsh*, *supra*, that the 3.45 acre tract in question was surrounded by a growing commercial area. In the present case, the 256 acres of appellants' property is surrounded by residential zoning on three sides with some preexisting commercial properties interspaced. Due to present zoning restrictions, its residential character has been fairly stable over the years.

Finally, in *Mayfield-Dorsh*, the court found that it was not practical to use the property for single-family residences due to the unique topography of the land, consisting of a flood plain and a steep incline on the property which would require all structures to be clustered in the center of the property. In the instant case, appellants' property, according to their own plan, could be subdivided into single-family dwellings as zoned without encountering any problems with the topography of the land. Therefore, *Mayfield-Dorsh* is distinguishable on the basis of the physical facts of the topography and the stability of the growth pattern in the instant case.

Appellants also argue in their first assignment of error that the property as zoned is useless for any practical purpose. During the trial, appellants presented evidence concerning the feasibility of using the land for single family units. A professional engineer presented a development plan in which the property would be divided into seventy-one three acre lots. This plan claimed to maximize the use of the land under the current zoning resolution. Based upon these calculations, a real estate appraiser testified that the land would have a negative fair market value if it were sold over a six year period.

Pursuant to this evidence, the trial court found that it was not economically feasible to build seventy-one single family units under the present regulations and restrictions.

> "6. Plaintiffs' real property could be subdivided into 71 lots if Plaintiffs were to meet all applicable zoning and Geauga County Planning Commission regulations. Such a subdivision would not be economically feasible.
>
> 7. Subdivision of Plaintiffs' real property into 71 lots is not mandated by the township zoning resolution."

Appellants claim that, given this finding, the trial court had to hold that the zoning resolution was unconstitutional, as it constituted an illegal taking of property under the Fifth Amendment.

As noted earlier, a zoning ordinance will be upheld unless the property owner can establish, beyond fair debate, that the classification is unconstitutional, unreasonable, and not substantially related to the public health, safety, morals or general welfare. *Mobil Oil Corp., supra.* In applying this standard, the Supreme Court has held that this burden has been carried when the property

owner can establish certain facts. For example, the resolution will be overturned if the restrictions render the property useless. See, *e.g., Negin v. Bd. of Bldg. and Zoning Appeals* (1982), 69 Ohio St. 2d 492. In at least one instance, the Supreme Court stated that the burden had been met when it was not economically feasible to use the land as zoned:

> "Where an isolated parcel of land is similarly zoned as are parcels with which it is contiguous on one side but it extends into and is surrounded on the three other sides by an area of land zoned for less restricted uses, where no feasible economic use of the former land can be made under the present zoning, and where a reduction to the next less restricted use is in harmony with the needs and nature of the neighborhood, the refusal by municipal authorities to extend the less restricted use to such property constitutes a taking of it without due process, resulting in its confiscation."
> *State, ex rel. The Killeen Realty Co., v. East Cleveland* (1959), 169 Ohio St. 375, paragraph four of the syllabus.

However, that court's statement as to the economic feasibility is limited by the other conditions stated in the ruling. Other jurisdictions have also held that a shcwing of economic infeasibility is sufficient to carry the burden. See 1 Anderson, American Law of Zoning (3 Ed.), Section 3.28. In addition, the United States Supreme Court has stated that a taking has occurred when the owner is denied any economically viable use of the property. *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104.

Thus, appellants' legal theory is correct; upon a showing that the property has no economical use as zoned, the ordinance must be declared unconstitutional. However, this court holds that the facts of this case can be distinguished from those in *Killeen* and *Negin, supra.*

In *Negin*, the property owner appealed the denial of a building permit. The owner's lot did not meet the minimum frontage requirement. Without the permit, the owner could only attempt to sell the useless lot or buy an adjacent lot. In holding that a taking had occurred, the court stated: "The rendering of such a lot useless for any practical purpose goes beyond mere limitation of use and becomes a confiscation." *Id.* at 497. Citing *Superior Uptown, Inc. v. Cleveland, Inc.* (1974), 39 Ohio St. 2d 36, the *Negin* court also emphasized that the owner was "totally restricted" as to the use of the property.

In the majority of cases in which the property was found to be useless or to have no economically feasible use, the court emphasized the *physical* characteristics of the land and its location. For example, in *Pure Oil Division v. Brook Park* (1971), 26 Ohio App. 2d 153, the property was surrounded by commercially zoned property and was at the intersection of two four lane roads. The court held: "The changed characteristics of the area make it impossible for the appellants to enjoy their property while zoned under a residential classification." *Id.* at 156.

Similar facts also were present in *State, ex rel. Prentke, v. Village of Brook Park* (1958), 107 Ohio App. 325, paragraph two of the syllabus, which states:

> "A zoning ordinance restricting property to single-residence use only is arbitrary and unreasonable, and is unconstitutional, as applied to vacant property on a main thoroughfare carrying heavy truck traffic in an industrial area and which property is no longer either useful or usable for residence purposes in its surrounding location and under the conditions which prevail in the locale."

See, also, *Henle v. City of Euclid* (1954), 97 Ohio App. 258, 268; *Brockman v. Morr* (1960), 112 Ohio App. 445, paragraph one of the syllabus.

In all of these cases, as well as *Killeen* and *Mayfield-Dorsh*, the physical characteristics or the location of the property rendered it useless under the applicable zoning ordinance. In this case, the land has no special characteristics, nor is it located in an area in which single family homes would not be desirable. The fact that appellant would not make a profit can merely be attributed to general economic conditions.

In addition, this court notes that the trial court's finding on economic feasibility was limited to whether the seventy-one lot single-family development, as proposed, was economically feasible. The court did not find that *any* single residence plan was economically unfeasible, nor did it find that the property could not be economically feasible with the development of one of the other uses under this classification.

In its judgment entry, the trial court stated that while their proposal was well reasoned and consistent with the public interest, appellants had not met the fair debate standard. This court concurs with that assessment. As noted earlier, a court cannot substitute its judgment for that of the trustee if the validity of the zoning resolution is fairly debatable. *Willott, supra.* Accordingly, the trial court did not err in upholding the zoning resolution.

Appellants have similarly failed to demonstrate that the zoning resolution is not in accordance with the township's comprehensive guide plan, as is argued in the second assignment of error. On the guide map included in the Guide Plan, appellants' property is located in the area designated R-3. The plan states such areas are recommended to be residential developments. This recommendation was implemented vis-a-vis the 1979

zoning amendment. Appellants' argument that this property was intended to be anything but residential is unsupported. Therefore, the second assignment of error is without merit.

Appellants' third assignment of error also fails. Appellants argue that the zoning resolution is void and unenforceable in that it prescribes a minimum lot size of three acres based upon "mere aesthetic considerations." However, appellants failed to conclusively prove that the three acre minimum lot restrictions is purely an aesthetic consideration. There is evidence in the record that such factors as water availability, topography, and geological characteristics, as well as the Bainbridge Township *Guide Plan 2000*, were also taken into consideration. Thus, appellants' contention that the restriction was based upon purely aesthetic considerations is unsupported by the record.

Appellants' fourth assignment of error is also not well taken. Appellants argue that township trustees are without authority to impose a minimum lot size of three acres since, pursuant to R.C. 711.05, the board of county commissioners cannot impose a greater minimum lot acres than four thousand eight hundred square feet. Therefore, appellants argue that this same restriction must apply to township trustees since township trustees "are not by statute delegated any right to regulate the creation of lots within a township." The Ohio Attorney General has concluded otherwise.

The syllabus of Opinion No. 70-074 reads that R.C. 711.05, which restricts the county commissioners from imposing a greater minimum lot size than four thousand eight hundred square feet, does not invalidate a township zoning resolution imposing a greater minimum lot size. In that opinion, the attorney general stated:

> "*** [T]he prohibition against the imposition of a greater minimum lot area than 4800 square feet contained in Section 711.05, *supra*, applies as against the county commissioners only. It cannot serve to control or restrict a township zoning resolution providing minimum lot areas." *Id.*

The opinion determined that the township may regulate minimum lot areas through R.C. 519.02 and the following case authority: *State, ex rel. Bugden Development Co., v. Kiefaber* (1960), 113 Ohio App. 523; *State, ex rel. Grant, v. Kiefaber* (1960), 114 Ohio App. 279.

This conclusion naturally should apply in the instant case thus negating appellants' contention that the township could not impose a minimum area lot requirement.

Appellants' fifth assignment of error is also without merit. A zoning resolution that considers the effects of pollution of the land and the underlying aquifer or to protect aquifer recharge areas would fall under the purview of R.C. 519.02 which permits townships to impose zoning regulations to promote the public health, safety and morals. Appellants' strict reading and interpretation of the statute would not conform to the legislative intent of the statute. Just as a township may impose minimum lot restrictions, though not specifically authorized by the statute, under the "public health, safety, welfare, and morals" provision, so may it be determined that concerns about the water supply must also be included.

Evidence was presented including testimony by the planning director of the Geauga County Planning Commission and a document entitled "Groundwater Resources of Geauga County," by Alfred C. Walker of

the Ohio Department of Natural Resources, published in 1978, which indicated that regulating water use should be a legitimate matter of concern to the township trustees. Therefore, it could not be found that the township trustees acted outside the scope of their authority granted under R.C. 519.02 in their consideration of the water supply in rejecting appellants' proposal.

Appellants allege in the sixth assignment of error that the lower court erred in finding that appellants had not shown any right to relief as to a claim in a taxpayer's action. It is appellants' contention that as a result of the zoning resolution restricting the property at issue to single-family areas, a heavier burden is placed on the citizens of Bainbridge Township than had the land been rezoned for commercial purposes. They further argue that this results in all taxpayers having to pay considerably more in taxes than they otherwise would in order to support all necessary services funded by taxes. At trial, the lower court dismissed the taxpayer's action claim upon defendant's motion (after plaintiffs were given the opportunity to argue this issue) pursuant to Civ. R. 41(B)(2) finding that the plaintiffs' evidence had not shown any right to relief. There is no evidence that the court abused its discretion in this matter.

It has been held that taxpayers may file a declaratory judgment action in regard to zoning restrictions, pursuant to Civ. R. 57 and R.C. 2721.03. *Brooks v. Cook Chevrolet, Inc.* (1972), 34 Ohio App. 2d 98. However, as in any action, appellants had to show a right to relief. The fact that tax revenues may be increased is no reason to invalidate a zoning resolution. There exists no *expectation right* to these revenues by

either the township or the school system. Therefore, the court could properly dismiss the claim for failing to show a right to relief.

Appellants have not demonstrated beyond the reach of fair debate that the township did not follow its comprehensive plan or that its decision is unreasonable, arbitrary or not related to the public health, safety or morals. The fact that the township trustees did not follow the recommendation of the Geauga Planning Commission is not conclusive. A review of the evidence before the trial court does not disclose the judgment was against the weight of the evidence.

The decision of the lower court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge

FORD, *J.*, Dissents with Dissenting Opinion
COX, *J.*, Seventh Appellate District
Sitting by assignment, Concurs with
Concurring Opinion

Case No. 1330

COURT OF APPEALS

ELEVENTH DISTRICT
GEAUGA COUNTY, OHIO

GAETANA R. KETCHEL, *et al.*,
Plaintiffs-Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants-Appellees.

DISSENTING OPINION

FORD, *J.*

I dissent to the majority's opinion on reconsideration.

This dissent adopts the analysis contained in my dissenting opinion to the original opinion in this case. Nothing in the present majority opinion appears to alter the conclusion that the present residential zoning provision limiting the residential development to single family dwellings on lots of a minimum of three acres with the width of at least two hundred feet is economically feasible no matter how the allotment is designed. Inferentially, increasing the minimum lot size in the discretion of the developer would equally not appear to enhance economic feasibility.

For these reasons, I dissent.

/s/ DONALD R. FORD
Judge

Cox, *J.*, concurring.

It is with reluctance that I concur with the opinion of Judge Christley in this matter. Had I sat on the appeal, I would have reversed and remanded the matter under the authority of the case of *Grant v. Washington Twp.* (1963), 1 Ohio App. 2d 84, paragraph 4 of the syllabus which states:

> "A judgment which voids an 80,000 square foot area requirement as applied to premises of some 400 acres in a fringe suburban area will be modified to declare the restriction unreasonable as applied to the entire acreage, but not unlawful as to a portion of the premises."

However, I am only reviewing the opinion upon the motion for reconsideration that was only permitted on the issue of the trial court's finding item 6; that plaintiff's real property could be subdivided into 71 lots if plaintiffs were to meet all the applicable zoning regulations of the Geauga County Planning Commission. Such a subdivision would not be economically feasible and Judge Christley's opinion on page 13 correctly cites *Willott v. Beachwood* (1964), 175 Ohio St. 557, that this court cannot substitute its judgment for that of the trustees if the validity of the zoning ordinance is fairly debatable.

APPROVED:

/s/ EDWARD A. COX
Judge of the Seventh
Appellate District,
Sitting by Assignment

JUDGMENT ENTRY OF THE COURT OF APPEALS UPON RECONSIDERATION

(Filed March 6, 1989)

Case No. 1330

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

GAETANA R. KETCHEL, *et al.*,
Plaintiffs-Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants-Appellees.

JUDGMENT ENTRY

For the reasons stated in the opinion upon reconsideration of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge
For the Court

FORD, *J.*, Dissents with Dissenting Opinion
COX, *J.*, concurs with Concurring Opinion
Seventh Appellate District
Sitting by assignment.

JUDGMENT ENTRY OF COURT OF APPEALS GRANTING MOTION FOR RECONSIDERATION

(Filed July 18, 1988)

Case No. 1330

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

GAETANA R. KETCHEL, *et al.*,
Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Appellees.

JUDGMENT ENTRY

Appellants' Motion for Reconsideration granted.

This Court's Opinion and Judgment Entry of May 9, 1988 is hereby vacated and held for naught. The Clerk of Court is instructed to reinstate this case in the records of this Court.

/s/ DONALD R. FORD
Presiding Judge
For the Court

OPINION OF THE COURT OF APPEALS

(Filed May 9, 1988)

Case No. 1330

COURT OF APPEALS

ELEVENTH DISTRICT
GEAUGA COUNTY, OHIO

GAETANA R. KETCHEL, *et al.*,
Plaintiffs-Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants-Appellees.

CHARACTER OF PROCEEDINGS:
Civil appeal from Geauga County Common Pleas Court Case No. 85 M 480

JUDGMENT:
AFFIRMED.

OPINION

CHRISTLEY, *J.*

Appellants are owners of approximately two hundred fifty-six acres of real property located in Bainbridge Township, Geauga County, Ohio. The property has been designated R-3A under a comprehensive plan, *Guide Plan 2000*, which was adopted by the township. As zoned, appellants' land is limited to the following uses: agriculture, single family dwellings on lots of a minimum of three acres with a width of at least 200 feet, places of worship, public and private schools, public parks or

other public recreation facilities, governmental buildings and cemeteries. The property is divided and owned or titled to several persons and entities.

Appellants joined in filing an amendment to the zoning resolution in order to rezone the residential property into multi-use property. This would allow commercial development which, in turn, would increase the value of the land to appellants. The proposed amendment, pursuant to R.C. 519.12, was referred to the Geauga Planning Commission which recommended that the township adopt it, with modifications. The township did not adopt the amendment.

Appellants filed a complaint in the Common Pleas Court of Geauga County, Ohio, requesting that the court find the present zoning restriction of their property to be unreasonable and thus void and unenforceable. Appellants further requested that the court order a directive to the trustees of Bainbridge Township that they rezone appellants' property according to their request for a multi-use designation within sixty days. Failure to do so would allow appellants to use their land in accordance with the use recommended by the Geauga Planning Commission.

The case was heard on June 16, 1986. The court found in favor of the appellees. Appellants filed a timely notice of appeal with the following assignments of error:

> I. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in granting judgment for the defendants on the basis that legislative enactments are presumed valid and if reasonably debatable on the facts may not be judicially stricken or modified when the court found as a fact that it would not be economically feasible to develop the property for the primary purpose

permitted by the zoning resolution and there was substantial uncontroverted evidence in the record to show that the zoning resolution was not related to the public health, safety or morals.

II. The trial court erred in not holding, as a matter of law, that the Bainbridge Township Zoning Resolution, was arbitrary and unreasonable as applied to plaintiffs' property for the reason that it is not in accordance with the Township's Comprehensive Plan, *Guide Plan 2000.*

III. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in not holding, as a matter of law, that a Township Zoning Resolution prescribing minimum lot sizes of three acres in order to preserve the natural quality of the landscape is void and unenforceable.

IV. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in not holding, as a matter of law, that the provision of the Bainbridge Township Zoning Resolution requiring a minimum lot size of three acres is void and unenforceable.

V. The Court of Common Pleas erred to the prejudice of plaintiffs-appellants in not holding, as a matter of law, that Township-Trustees may not enact a zoning resolution for the purpose of preventing pollution of land and the underlying aquifers or to protect aquifer recharge areas.

VI. The Court of Common Pleas erred to the prejudice of the taxpayers plaintiffs-appellants in dismissing the fifth cause of action set forth in the complaint upon finding that plaintiffs' evidence has not shown any right to relief as to the taxpayer's action claim (R. 532).

Appellants' first assignment of error is not well taken.

In challenging the constitutionality of a zoning ordinance, the party making the challenge is faced with a heavy burden in any attempt to invalidate an existing zoning classification. Zoning ordinances enacted pursuant to the police powers of a governmental entity are presumed to be valid until the contrary is clearly shown by the party attacking the ordinance. *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93; *Mayfield-Dorsh, Inc. v. South Euclid* (1981), 68 Ohio St. 2d 156, 157. The burden of demonstrating the unconstitutionality or unreasonableness of a zoning restriction, at all stages of litigation, rests with the property owner making the challenge. *Leslie v. Toledo* (1981), 66 Ohio St. 2d 488, 489; *Brown v. Cleveland, supra,* at 95.

In order for a property holder to prevail, it must be demonstrated to the court that the zoning provision is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals, or general welfare. *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395. The evidence must be sufficient to take the matter beyond the reach of fair debate. *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23. When the validity of the zoning ordinance is found to be fairly debatable, the court will not substitute its judgment for that of the legislature or the people. *Willott v. Beachwood* (1964), 175 Ohio St. 557, 560. The validity of a zoning restriction as applied to particular property is fairly debatable if reasonable minds may differ. *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34, 51. The fairly debatable rule must concern itself with basic *physical facts* pertinent to the issue of the validity of the zoning ordinance and not with mere words or differing opinions. *Id.*

Upon reviewing the transcript and exhibits in the instant case, the lower court ruled that appellants failed to meet their burden of proving that the zoning of their property was beyond the reach of fair debate.

For example, much of the trial testimony focused on the availability of water to the area. Appellants' experts relied primarily on studies which were not "site specific" in terms of well water availability. There was also testimony that some of these studies were not reliable in terms of how much well production could be anticipated. It was also clear that assumptions had been made by appellants that water service could be contracted for with neighboring municipalities when no such agreements were contemplated or in existence.

There was also much made of the presence of CEI power transmission lines on part of the property. However, no specific evidence was presented as to their exact effect on either the property as presently zoned or as proposed. There was testimony solicited that there were other developments which had apparently been able to utilize residential lots bordering by CEI lines.

Appellants' experts, when pinned down, could not state with certainty that the character of the area was currently changing. When they were questioned about specific current nonresidental uses, it became apparent that almost all of those uses were either preexisting uses or allowable under the present R-3, such as the seasonal farm market.

Therefore, there is nothing in the record to persuade this court to reverse the lower court's decision as being against the manifest weight of evidence.

As a further issue in the first assignment, appellants allege two specific faults with the zoning resolution as it relates to their property, to-wit: that the resolution does not promote or protect the public health, safety, or morals.

In support of their contention, appellants cite *Mayfield-Dorsh, supra.* Although this case cited does relate to facts similar to those in the present case, there are facts that distinguish the two cases.

In *Mayfield-Dorsh,* the property owners sought to have their property rezoned from single-family to multi-family development in order to build condominiums. The court in *Mayfield-Dorsh, supra,* found that the proposal for the development of condominiums was harmonious with the surrounding property since testimony from the Mayor of South Euclid was to the effect that the area surrounding the 3.45 acre tract had not maintained an essentially residential character. That relevant portion of the mayor's testimony was provided and reads as follows:

> "Q. Now, you stated that it is not reasonable.
>
> A. It might be unreasonable to have this single-family usage, right, or single-facility lots on Mayfield Road, *considering the change and character of Mayfield Road over the years.****"
> *Mayfield-Dorsh, supra,* at 158, fn. 2 (Emphasis in original.)

In the present case, the record demonstrated that the area surrounding appellants' property has not substantially changed since the original zoning ordinance was adopted. As presently situated, appellants' property is bounded to the north by a residential development, to the west by a residential district which includes a rental

company (a nonconforming use) which was in existence prior to the zoning ordinance, to the south is Knowles Industrial Park in a nonresidential district, and to the east by a zoned residential district containing several commercial establishments also in existence prior to the zoning ordinance (Plaintiff's Exhibit 26, *Guide Plan 2000*). Thus in comparing the two cases, the court found in *Mayfield-Dorsh*, *supra*, that the 3.45 acre tract in question was surrounded by a growing commercial area. In the present case, the 256 acres of appellants' property is surrounded by residential zoning on three sides with some preexisting commercial properties interspaced. Due to present zoning restrictions, its residential character has been fairly stable over the years.

Finally, in *Mayfield-Dorsh*, the court found that it was not practical to use the property for single-family residences due to the unique topography of the land, consisting of a flood plain and a steep incline on the property which would require all structures to be clustered in the center of the property. In the instant case, appellants' property, according to their own plan, could be subdivided into single-family dwellings as zoned without encountering any problems with the topography of the land. Therefore, *Mayfield-Dorsh* is distinguishable on the basis of the physical facts of the topography and the stability of the growth pattern in the instant case.

Appellants also argue in their first assignment of error that the property as zoned is useless for any practical purpose. Appellants have not proven this to the extent of overcoming the "fair debate" rule. Appellants presented testimony that if the property as presently zoned required six years to be sold off in three (3) acre lots it would result in a value of minus six thousand

dollars. Those calculations were based on the financing costs, the loss of potential investment income, management and development costs. However, that negative value would be a lot more relevant if the zoning had been restricted *after* appellants had acquired the land. That is not the case.

Appellants bought the land as it is presently zoned. All of the accounting factors used in the above calculation were available to appellants at the time of purchase. Therefore, they had to know at time of purchase in 1979 that if their plans for rezoning failed, they would lose money. If their plans succeeded, they had the potential to make a lot of money.

Although appellants could receive a greater return on their investment if the area were rezoned per their request, the property as presently zoned is not useless for all practical purposes. It was at the time of purchase and is now possible to construct single-family residences in accordance with the zoning resolution. We are not convinced that a real estate investment that becomes financially unsound as a result of an inability to effect a zoning change is the kind of "hardship" situation envisioned by *Mayfield-Dorsh, supra.* Therefore appellants' first assignment of error is not well taken.

Appellants have similarly failed to demonstrate that the zoning resolution is not in accordance with the township's comprehensive guide plan, as is argued in the second assignment of error. On the guide map included in the Guide Plan, appellants' property is located in the area designated R-3. The plan states such areas are recommended to be residential developments. This recommendation was implemented vis-a-vis the 1979 zoning amendment. Appellants' argument that this

property was intended to be anything but residential is unsupported. Therefore, the second assignment of error is without merit.

Appellants' third assignment of error also fails. Appellants argue that the zoning resolution is void and unenforceable in that it prescribes a minimum lot size of three acres based upon "mere aesthetic considerations." However, appellants failed to conclusively prove that the three acre minimum lot restriction is purely an aesthetic consideration. There is evidence in the record that such factors as water availability, topography, and geological characteristics as well as the Bainbridge Township *Guide Plan 2000* were also taken into consideration. Thus, appellants' contention that the restriction was based upon purely aesthetic considerations is unsupported by the record.

Appellants' fourth assignment of error is also not well taken. Appellants argue that township trustees are without authority to impose a minimum lot size of three acres since, pursuant to R.C. 711.05, the Board of County Commissioners cannot impose a greater minimum lot area than 4800 square feet. Therefore, appellants argue that this same restriction must apply to township trustees since township trustees "are not by statute delegated any right to regulate the creation of lots within a township." The Ohio Attorney General has concluded otherwise.

The syllabus of Opinion No. 70-074, reads that R.C. 711.05 which restricts the county commissioners from imposing a greater minimum lot size than 4800 square feet does not invalidate a township zoning resolution imposing a greater minimum lot size. In that opinion, the attorney general stated:

> "... [T]he prohibition against the imposition of a greater minimum lot area than 4800 square feet contained in Section 711.05, *supra*, applies as against the county commissioners only. It cannot serve to control or restrict a township zoning resolution providing minimum lot areas." *Id.*

The opinion determined that the township may regulate minimum lot areas through R.C. 519.02 and the following case authority: *State, ex rel. Bugden Development Co., v. Kiefaber* (1960) 113 Ohio App. 523; *State, ex rel. Grant, v. Kiefaber,* (1960), 114 Ohio App. 279.

This conclusion naturally should apply in the instant case thus negating appellants' contention that the township could not impose a minimum acre lot requirement.

Appellants' fifth assignment of error is also without merit. A zoning resolution that considers the effects of pollution of the land and the underlying aquifer or to protect aquifer recharge areas would fall under the purview of R.C. 519.02 which permits townships to impose zoning regulations to promote the public health, safety and morals. Appellants' strict reading and interpretation of the statute would not conform to the legislative intent of the statute. Just as a township may impose minimum lot restrictions, though not specifically authorized by the statute, under the "public health, safety, welfare, and morals" provision, so may it be determined that concerns about the water supply must also be included.

Evidence was presented including testimony by the planning director of the Geauga County Planning Commission and a document entitled "Groundwater Resources of Geauga County," by Alfred C. Walker of

the Ohio Department of Natural Resources, published in 1978, which indicated that regulating water use should be a legitimate matter of concern to the township trustees. Therefore, it could not be found that the township trustees acted outside the scope of their authority granted under R.C. 519.02 in their consideration of the water supply in rejecting appellants' proposal.

Appellants allege in the sixth assignment of error that the lower court erred in finding that appellants had not shown any right to relief as to a claim in a taxpayer's action. It is appellants' contention that as a result of the zoning resolution restricting the property at issue to single-family areas, a heavier burden is placed on the citizens of Bainbridge Township than had the land been rezoned for commercial purposes. They further argue that this results in all taxpayers having to pay considerably more in taxes than they otherwise would in order to support all necessary services funded by taxes. At trial, the lower court dismissed the taxpayer's action claim upon defendant's motion (after plaintiffs were given the opportunity to argue this issue) pursuant to Civ. R. 41(B)(2) finding that the plaintiffs' evidence had not shown any right to relief. There is no evidence that the court abused its discretion in this matter.

It has been held that taxpayers may file a declaratory judgment action in regard to zoning restrictions, pursuant to Civ. R. 57 and R.C. 2721.03. *Brooks v. Cook Chevrolet, Inc.* (1972), 34 Ohio App. 2d 98. However, as in any action, appellants had to show a right to relief. The fact that tax revenues may be increased is no reason to invalidate a zoning resolution. There exists no *expectation right* to these revenues by

either the township or the school system. Therefore, the court could properly dismiss the claim for failing to show a right to relief.

Appellants have not demonstrated beyond the reach of fair debate that the township did not follow its comprehensive plan or that its decision is unreasonable, arbitrary or not related to the public health, safety or morals. The fact that the township trustees did not follow the recommendation of the Geauga Planning Commission is not conclusive. A review of the evidence before the trial court does not disclose the judgment was against the weight of the evidence.

The decision of the lower court is affirmed.

/s/ JUDITH A. CHRISTLEY
Judge

FORD, *P.J.*, dissents with dissenting opinion
COOK, *J.*, concur

Case No. 1330

COURT OF APPEALS

ELEVENTH DISTRICT
GEAUGA COUNTY, OHIO

GAETANA R. KETCHEL, *et al.*,
Plaintiffs-Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants-Appellees.

DISSENTING OPINION

FORD, *P.J.*

While I concur in the majority's treatment of appellant's second through sixth assignments of error, I dissent to that part of the result reached in the first assignment of error upholding the zoning plan that no building or structure may be erected on a lot consisting of less than three acres.

Given the presumption of validity which attaches to zoning enactments, the party challenging the same has the burden of demonstrating that the subject enactment is not reasonably related to the public health, welfare, safety, or morals. *Willott v. Beachwood* (1964), 175 Ohio St. 557; *Gray v. Trustees of Monclova Township* (1974), 38 Ohio St. 2d 310. As previously stated by this court:

> "*** A successful declaratory judgment challenge of a zoning classification must demonstrate, beyond fair debate, that said zoning classification is

> unconstitutional, unreasonable, and not substantially related to the public health, safety, morals or general welfare." [Citations omitted.] *Advanced Realty Transaction v. Painesville* (March 30, 1984), Lake App. No. 9-106, unreported, at page 3.

In this case, I believe that the appellants have met their burden of establishing beyond fair debate that the three acre requirement is not so reasonably related to the public health, safety, welfare, or morals as to find it a valid zoning enactment.

In *State, ex rel. The Killeen Realty Co., v. City of East Cleveland* (1959), 169 Ohio St. 375, the Ohio Supreme Court held, at paragraph four of the syllabus, as follows:

> "Where an isolated parcel of land is similarly zoned as are parcels with which it is contiguous on one side but it extends into and is surrounded on the three other sides by an area of land zoned for less restricted uses, *where no feasible economic use of the former land can be made under the present zoning,* and where a reduction to the next less restricted use is in harmony with the needs and nature of the neighborhood, the refusal by municipal authorities to extend the less restricted use to such property constitutes a taking of it without due process, resulting in its confiscation." (Emphasis added.)

See, also, *Pure Oil Division v. Brookpark* (1971), 26 Ohio App. 2d 153, and *State, ex rel. Prentke, v. Village of Brook Park* (1958), 107 Ohio App. 325, both of which stand for the general proposition that if a zoning classification has the effect of making it extremely difficult or virtually impossible to develop land as zoned, it is arbitrary, unconstitutional in its application, and results in a taking of property.

Relevant to the foregoing proposition of law is the following language in *In re Appeal of McDonald* (1963), 119 Ohio App. 15:

> "Zoning from its inception was recognized as a deprivation of individual property rights, valid only if such impairment of the full use of the property by the owner was justified by a law enacted pursuant to the police power and reasonably necessary for the preservation of the public health, safety and morals. *Pritz v. Messer,* 112 Ohio St., 628.
>
> Thereafter, a comprehensive plan of zoning was held to validate a restrictive zoning law, and a long line of cases, cited and followed by the trial court in its opinion, held that this aspect of zoning was a legislative function and not subject to judicial review, if debatable. *Shopping Centers of Greater Cincinnati, Inc. v. City of Cincinnati,* 83 Ohio Law Abs., 548 and 552. It has been repeatedly held that there is a presumption that such legislation bears a direct relationship to the public welfare so as to require the property owner to show by a preponderance of the evidence that the classification causes serious damage and is not a necessary or reasonable exercise of the police power." *Id.* at 16.

In the present action, the trial court upheld the validity of the three acre building requirement, despite its finding that such requirement was economically unfeasible. As stated by the trial court in its findings of fact:

> "Plaintiffs' real property [approximately 256.53 acres] could be subdivided into 71 lots if Plaintiffs were to meet all applicable zining [sic] and Geauga Planning Commission regulations. Such a subdivision would not be economically feasible."

In view of this finding, it is difficult to perceive how the trial court could uphold the three acre restriction. In my view, finding that the three acre limitation is

economically unfeasible demonstrates that there is no use to which the property could be put, thus rendering the zoning legislation an unconstitutional taking of property. As stated by this court in *Advanced Realty, supra*:

> "It is fundamental that a municipality cannot arbitrarily restrict the use of property so as to amount to confiscation. *State ex rel. Stulbarg v. Leighton* (1959), 113 Ohio App. 487.
>
> It has been held to be confiscation of property if a regulation restricts the use of land as to render it valueless (*Brockman v. Morr* (1960), 112 Ohio App. 445), leaves the owner with the right to use the land for purposes that are not economically feasible (*State ex rel. Killeen Realty Co. v. East Cleveland* (1958), 108 Ohio App. 99), or permits the owner only uses which are highly improbable or practically impossible under the circumstances (*Henle v. Euclid* (1954), 97 Ohio App. 258). Such a regulation has no reasonable tendency to serve the health, safety, morals or welfare of the community. *Kessler v. Smith* (1957), 104 Ohio App. 213." *Id.* at p. 7.

The trial court's findings of fact placed a certain amount of emphasis on the fact that appellants' properties include two dwellings which are currently occupied for residential purposes. While it is true that there are two residential dwellings on appellants' lands, such a finding is irrelevant to the issue here. Rather it is the effect that the presently proposed zoning classification will have on the subject properties. The trial court fails to indicate the relationship between the two currently existing residences and the three acre building requirement sought to be imposed here.

In view of the trial court's determination that a subdivision of appellants' lots into seventy-one three acre parcels would be economically unfeasible, I would reverse that portion of the trial court's judgment upholding that part of the zoning law which prohibits a building or structure from being erected on a lot less than three acres.

/s/ DONALD R. FORD
Presiding Judge

JUDGMENT OF THE COURT OF APPEALS

(Filed May 10, 1988)

Case No. 1330

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

GAETANA R. KETCHEL, *et al.*,
Plaintiffs-Appellants,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants-Appellees.

For the reasons stated in the opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Judge for the Court

FORD, *P.J.*, Dissents with dissenting opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS

(Filed August 6, 1986)

Case No. 85 M 480

IN THE COURT OF COMMON PLEAS

GEAUGA COUNTY, OHIO

GAETANA P. KETCHEL, *et al.*,
Plaintiffs,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Civ. R. 52, the Court states as follows:

FINDINGS OF FACT

1. Plaintiffs own approximately 256.53 acres of real property located in Bainbridge Township, Geauga County, Ohio.

2. Bainbridge Township, through the Board of Township Trustees, has adopted a township zoning resolution in accordance with a comprehensive plan.

3. The real property owned by Plaintiffs is located in an area designated as the R-3 Rural Residential District, pursuant to the Bainbridge Township Zoning Resolution.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed June 16, 1986)

Case No. 85 M 480

IN THE COURT OF COMMON PLEAS

GEAUGA COUNTY, OHIO

GAETANA P. KETCHEL, *et al.*,
Plaintiffs,

vs.

BAINBRIDGE TOWNSHIP, *et al.*,
Defendants.

JUDGMENT ENTRY

This matter came on for trial on March 17, 1986 upon the Plaintiff's complaint for declaratory judgment. Present were the parties in person and/or by counsel, Stephen G. Thomas and Edwin J. Ketchel for Plaintiffs; Forrest W. Burt for Defendants.

The Court finds in favor of Defendants.

This case was thoroughly and well tried and briefed by the parties and their counsel. It is, however, a classic example of the application of two (2) overriding principles of Ohio law:

(1) Legislative enactments, including zoning enactments, are presumed valid with the burden of proof being upon those who challenge that

validity to show the contrary. *BROWN VS. CLEVELAND* (1981), 66 Ohio St. 2d 93 and many others.

(2) Zoning classifications of land use are a legislative function, and if reasonably debatable on the facts, may not be judicially stricken or modified regardless what the courts might do if called upon to decide the debate in the first instance. *Willot v. Beachwood* (1964), 175 Ohio St. 557. *Curtis v. Cleveland* (1959), 170 Ohio St. 127.

The Plaintiffs' proposal seems well reasoned and consistent with the public interest and comprehensive land use plan for Bainbridge Township. There are ways to implement it or comparable proposals within the framework of the Bainbridge Township Zoning Resolution, e.g. amendments to or variance from its terms. However, the court accepts the factual analysis and arguments of Defendants' counsel in this case. Plaintiffs have failed to overcome the foregoing principles as they relate to the challenged portions of the resolution.

In passing, the Court recommends careful reading and possible implementation of the principles contained in the recent Ohio Supreme Court decision of *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83.

IT IS THEREFORE ORDERED that judgment on Plaintiffs' complaint be and it is hereby rendered for Defendants, at Plaintiffs' costs.

/s/ H. F. INDERLIED, JR.
Judge

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated September 5, 1990)

Case No. 89-693

THE SUPREME COURT OF OHIO

GAETANA KETCHEL, *et al.*,
Appellants,

v.

BAINBRIDGE TOWNSHIP, *et al.*,
Appellees.

REHEARING ENTRY

(Geauga County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 1330)

/s/ THOMAS J. MOYER
Chief Justice

SECTION 6D, BAINBRIDGE TOWNSHIP ZONING RESOLUTION

6D R-3A RURAL RESIDENTIAL DISTRICT

In accordance with Township objectives, to provide for development of lands within the community zoned for residential, in accordance with the ability of such lands to support development without central water supply and/or central sewerage disposal facilities, to prevent pollution of such lands and the underlying aquifers by excessive development, and to protect the acquifer recharge areas, the R-3A Rural Residential District is established in accordance with the following regulations:

6D-10 *Permitted Uses:* Only the following uses shall be permitted in the R-3A District, after obtaining a valid Zoning Certificate therefor:

a. Agriculture (no permit required for those uses as defined in section 3C-2 of this Resolution) and uses accessory thereto.

b. Single-family dwellings

c. Places of worship

d. Public and private schools

e. Public parks, playgrounds and other public recreations facilities. Privately owned facilities, for the use of which admission is charged or membership required, are not to be deemed "public parks, playgrounds or recreation facilities", even if open to the public.

f. Township and other governmental buildings

g. Cemeteries

6D-20 *Accessory Uses:*

1. Only the following Accessory Structures and Uses shall be permitted in the R-3A District, after obtaining a valid Zoning Certificate therefor:

   (1) Private attached or detached garages and carports, barns, tool sheds, storage shelters and animal shelters.

   (2) Non-commercial swimming pools, as defined in Section 3C-88 of this Resolution.

   (3) Home professional office of a physician, dentist, attorney, musician, teacher, engineer, architect, planner or artist; provided that use of the premises by such professional qualifies and at all times continues to qualify as a home occupation, as defined in Section 3C-37 of this Resolution.

   (4) Home occupation of dressmaking, millinery or homecooking conducted only by resident occupants of the dwelling; provided that use of the premises qualifies and at all time continues to qualify as a home occupation, as defined in Section 3C-37 of this Resolution.

   (5) Roadside Stands; provided that sales conducted therefrom are limited to the sale of agricultural commodities (not including animals) produced on the premises and further provided that such stands be located not less than twenty (20) feet from the nearest right of way line and that parking be provided for the safe parking of at least three (3) automobiles. Products are deemed to be produced on the premises only if every stage of production and/or processing is

conducted thereon. Products grown or processed elsewhere are not products produced on the premises, even if indistinguishable from products so produced.

6D-30 *Area, Yard, Height, Bulk and General Regulations*

a. Height: No building or other structure shall exceed a height of thirty-five (35') feet or two and one-half stories, whichever is less.

b. Lot and Yard Requirements: Within the R-3A District, no building or structure shall be erected, nor any lot or land area developed unless in conformity with the following requirements. All dimensions shall be exclusive of highway or road rights-of-way and shall also exclude lands subject to easements of record:

Minimum Lot Area (Sq. Ft.)	130,680
Maximum Lot Coverage	10%
Minimum Lot Width (Ft.)	200
Minimum Front Yards (Ft.)	100
Minimum Side Yard (Ft.)	50
Minimum Side Yard Abutting a Street On Corner Lot (Ft.)	75
Minimum Rear Yard Depth (Ft.)	90

c. Dwelling Bulk: Dwellings or structures shall have a minimum area of one-thousand (1,000) square feet of living space by outside dimensions, exclusive of porches, garages and cellars or basements.

4. The following uses are permitted in the R-3 Rural Residential District:

(1) Agriculture, (2) Single family dwellings, (3) Places of Worship, (4) Public and Private Schools, (5) Public parks, playgrounds, and other public recreation facilities, (6) Township and other governmental buildings, and (7) Cemeteries.

5. Within the R-3 Rural Residential District of Bainbridge Township, no building or structure may be erected on a lot of less than three acres (130,680 sq. ft.) on a lot with a width of less than 200 feet.

6. Plaintiffs' real property could be subdivided into 71 lots if Plaintiffs were to meet all applicable zining [sic] and Geauga County Planning Commission regulations. Such a subdivision would not be economically feasible.

7. Subdivision of Plaintiffs' real property into 71 lots is not mandated by the township zoning resolution.

8. Plaintiffs' real property includes two dwellings which are currently occupied for residential purposes.

9. Plaintiffs' real property would be of more value if said property were in a zoning district which permitted mixed uses such as multi-family dwellings, commercial uses, and industrial uses.

CONCLUSIONS OF LAW

1. Duly enacted township zoning regulations are presumed valid. The party challenging the validity of zoning regulation bears the burden of proving that the zoning regulation is invalid.

2. Zoning classifications of land use are a legislative function, and, if reasonably debatable on the facts, may not be judicially stricken or modified, regardless of what a court might do if called upon the classify the land use in the first instance.

3. The appropriateness of the present zoning classification of Plaintiffs' real property is reasonably debatable on the facts, and, therefore, Plaintiffs failed to sustain their burden of proving that the Bainbridge Township zoning regulations should be stricken.

/s/ H. F. INDERLIED, JR. 8/6/86
Judge

d. Floor Area: Dwellings or structures shall have the following minimum floor areas:

0-2	bedrooms	=	1,200	square	feet
3	bedrooms	=	1,350	square	feet
4	bedrooms	=	1,500	square	feet
5	bedrooms	=	1,650	square	feet

e. Signs: All signs shall conform to the requirements of Section 10 of this Resolution.

SECTION 15J, BAINBRIDGE TOWNSHIP ZONING RESOLUTION

15J *PROCEDURE FOR VARIANCE APPLICATIONS*

15J-10 *Application; Contents*

A variance from the provisions of this Resolution shall not be considered by the Board of Zoning Appeals unless a written application therefor is submitted containing:

15J-11 Name, address and phone number of applicant(s), and attorney(s) representing applicant(s), if any;

15J-12 Legal description of property which is the subject of the application;

Nature of variance requested, by reference to specific Sections of this Resolution the terms of which are to be varied;

A narrative statement of facts supporting one or more of the following conclusions, if applicable:

(a) That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which do not pertain to other lands, structures or buildings in the same district;

(b) That a literal application of the provisions of this Resolution would deprive the applicant of property rights generally enjoyed by other owners of property in the same District;

(c) That any special conditions and circumstances upon which applicant relies do not result from any acts or failure to act on the part of the applicant;

(d) That granting the variance requested will not adversely affect the use or value of neighboring and other properties;

(e) That granting the variance requested will not confer on the applicant any special privilege that is denied by this Resolution to other lands, structures or buildings in the same District;

(f) That granting the variance requested would not defeat or derogate from the accomplishment of any of the general objectives of this Resolution or the Bainbridge Township Guide Plan.

15J-20 *Notice*

In addition to any public notice required by law and the general requirements of this Resolution, the Board shall cause notice of the time and place of the hearing on a variance application to be sent by certified mail to all owners of property, as shown on the latest available tax duplicate of Geauga County, within three hundred (300') feet of any portion of the land which is the subject of the application. If all parcels within said radius are owned by the applicant, the owners of all properties abutting the applicant's holdings shall be so notified. Failure of delivery of said notice shall not invalidate the Board's proceedings.

15J-30 *Conditions and Safeguards*

In granting a variance application, the Board may impose conditions and safeguards for the protection of neighboring properties, to further accomplishment of the purposes of this Resolution, and to protect the public health, safety and welfare. Violation of the terms of such conditions and safeguards shall be deemed a violation of this Resolution, and shall give rise to the penalties and remedies for such violation provided by law and by this Resolution.

15J-40 *Limitation*

The Board of Appeals shall not grant any application for a variance if the result sought by the applicant could be substantially accomplished by a rezoning of the property.